Supreme Court, U.S.
FILED
06-686 NOV 8 - 2006
OFFICE OF THE CLERK

No. 06-____

IN THE
Supreme Court of the United States

LUCKY I. IROMUANYA,

Petitioner,

v.

STATE OF NEBRASKA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Nebraska

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a defendant's right to due process is violated if a member of the victim's family is allowed to testify to the victim's identity when: (1) the defendant offers to stipulate to the victim's identity; (2) there is a non-related witness available to testify to the victim's identity; and (3) the testimony of the family member includes an emotional outburst?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Lucky I. Iromuanya respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Nebraska in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Nebraska is reported at 719 N.W.2d 263 (Neb. 2006) (App. 1a). The relevant orders of the trial court are unpublished (App. 57a).

STATEMENT OF JURISDICTION

The judgment of the Supreme Court of Nebraska was issued on August 11, 2006. This Court has jurisdiction over this petition under 28 U.S.C. § 1257(a) (2000).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law."

The Fourteenth Amendment to the United States Constitution provides in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

The child of Nigerian parents, Lucky Ikenna Iromuanya was raised in Lincoln, Nebraska, where he attended Hamilton College, pursuing a degree in Criminal Justice. In 2000, Iromuanya volunteered for AmeriCorps, a federal program for individuals committed to community service. While working for AmeriCorps, he chose to tutor and mentor children in inner-city neighborhoods in Nebraska.[1] In 2002, the Governor of Nebraska personally presented Iromuanya with an award for outstanding service in AmeriCorps. In 2004, Iromuanya volunteered for the Lincoln Action Program, a non-profit organization dedicated to assisting low-income victims of crimes, particularly battered women and victims of burglary.[2]

On the evening of April 24, 2004, Iromuanya and a friend, Aroun Phaisan, were invited to a house party at the University of Nebraska at Lincoln ("UNL"). The party was hosted by two members of the women's soccer team, Jenna Cooper and Lindsey Ingram. By the time Iromuanya and Phaisan arrived, the house was crowded with UNL students,

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[1] Iromuanya's mother, Helen Iromuanya, a nurse, stated that her son carried a small pistol, a Derringer, because he had been shot at, his car had been broken into twice, and his girlfriend's car had once been struck by several bullets. *See* Brian Christopherson, *The Lesson of a Lifetime*, Lincoln Journal Star, Apr. 23, 2005, at 1. Julie Iromuanya, his sister, who is a PhD candidate at the University of Nebraska, confirmed that her brother carried a pistol because of difficulties he had encountered in the inner-city. Weeks before the incident, Maggie Rugh, who had invited Iromuanya to the party, asked him why he carried a gun. Iromuanya explained to her that she didn't "understand what goes on in Lincoln." *See* Trial testimony of Maggie Rugh (Trial Tr. vol. 6, 930).

[2] *See* Trial testimony of Aroun Phaisan (Trial Tr. vol. 10, 1684-85). *See also* Lincoln Action Home Page, http://www.lincoln-action.org/.

many of whom were playing drinking games.[3] The party had been going on since early in the evening and those at the party had been drinking heavily.[4]

Iromuanya and Phaisan arrived at the party shortly after 1:30 a.m. Soon after their arrival, a set of shot glasses was stolen from the house. Although neither Iromuanya nor Phaisan had seen who had taken the glasses, Phaisan, who was Asian, became concerned that he and Iromuanya, as minorities, would be accused of stealing the glasses. To avoid trouble, Phaisan and Iromuanya left the house.

Before Iromuanya and Phaisan reached Phaisan's car, co-host Ingram ordered them not to leave until the glasses were recovered. The two obeyed the order, remaining in the driveway. Then Ingram's boyfriend Nolan Jenkins, a large, drunken, white male,[5] rushed out of the house and attacked Iromuanya, grabbing his shirt with both hands and shoving him backwards. Jenkins accused Iromuanya of stealing the shot glasses.

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[3] *See* Trial testimony of Najeh Williams (Trial Tr. vol. 6, 914-16).

[4] *See* Trial testimony of Lindsey Ingram (Trial Tr. vol. 4, 721; vol. 5, 776, 813-819) (Ingram testified there were bottles of beer, rum, vodka and tequila at the party). *See also* Trial testimony of Lincoln Police Investigator Kathleen Phillips (Trial Tr. vol. 11, 1771) (Lincoln Police Department investigators found a number of empty beer cans strewn around the yard); (Trial. Tr. vol. 11, 1747) (Investigator Phillips reported that there were 34 people at the party).

[5] Jenkins testified that he stands nearly six feet tall and was able to bench-press approximately 340 pounds at the time. *See* Trial testimony of Nolan Jenkins (Trial Tr. vol. 13, 2117). He was also a state wrestling champion in high school. *See* Trial testimony of Lindsey Ingram (Trial Tr. vol. 5, 810). Jenkins also testified that he had consumed a case of beer that night. *See* Trial testimony of Nolan Jenkins (Trial Tr. vol. 13, 2109).

Less than a minute later, Jenkins "again went after Iromuanya, who would later tell police that he felt threatened."[6] Jenkins maintained that he returned to apologize, having discovered that Iromuanya was not responsible for stealing the glasses. As Jenkins approached at "a pretty good pace," one of his friends, Adam Ellingson, came within inches of Iromuanya's face and words were exchanged.[7] Iromuanya pushed him away. In the confusion, Iromuanya, fearing for his safety, removed a Derringer from the pocket of his trousers and, intending to fire a warning shot into the air, pulled the trigger. A single bullet grazed the side of Jenkins' head, and then, ricocheting another twenty to twenty-five feet, struck Cooper. Cooper was taken to the hospital, where she was treated by Dr. Reginald Burton. Cooper died that same day.

The atmosphere leading up to and surrounding the trial was angry and chaotic: within a week of the shooting, white supremacist organizations had decided to make Cooper's death a rallying point for their causes. On May 1, 2004, the National Alliance[8] began distributing handbills[9] in the

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[6] John Walters & Jaime Lowe, *The Mourning After*, Sports Illustrated On Campus (Sept. 27, 2004), *available at* http://sportsillustrated.cnn.com/2004/sioncampus/09/22/nebraska0923/ (last visited Nov. 7, 2006). *See also* Trial testimony of Aroun Phaisan (Trial Tr. vol. 10, 1642-43).

[7] *See* Trial testimony of Aroun Phaisan at 1642-48; *see also* Trial testimony of Adam Ellingson (Trial Tr. vol. 13, 2036).

[8] The National Alliance which, according to its own publication, bars "[p]ersons of Jewish descent, homosexuals . . . [and] persons with more than an undetectable trace of non-White ancestry," is devoted to "educating the public on the often-deadly consequences for Whites of changing our society . . . into a multiracial social experiment." Henry Reese, *Death of Jenna Cooper Brings Outreach Effort by Whites; Governor Had Lauded Black Killer in Pre-Murder Awards Ceremony*, http://www.nationalvanguard.org/story.php?id=2804 (last visited Nov. 6, 2006). *See also* William Lamb, *Neo-Nazis Spread Leaflets on Lawns*, St.

neighborhood where Cooper had lived. The activity of the National Alliance and other white supremacist groups continued through the summer of 2004, including a rally held by the National Socialist Movement[10] and the National Knights of the Ku Klux Klan on the steps of the Nebraska State Capital.[11] Just before trial, members of the National

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Louis Post-Dispatch, Mar. 3, 2005, at A1 (describing the National Alliance as "one of the nation's most prominent hate groups").

[9] The handbills read: "The fatal shooting of Jenna Cooper was proof that races should not mix." Cindy Gonzalez, *White Supremacist Fliers Denounced, The National Alliance Handbills Say the Fatal Shooting of an NU Soccer Player was Proof Races Should Not Mix*, Omaha World-Herald, May 4, 2004, at 2.

[10] The National Socialist Movement ("NSM"), according to its website, is the "largest neo-Nazi Party operating in the United States of America today." NSM, http://www.nsm88.com (last visited Nov. 7, 2006). The NSM explained its focus on the death of Jenna Cooper as follows:

> Why Nebraska? The Midwest is America's Heartland, and the largest bastion of White/Aryan blood is here in the Midwest. April 25th, 2004: University of Nebraska-Lincoln soccer star Jenna Cooper was shot and killed by an [*sic*] negro who was stealing shot glasses from a local bar. The negro was angered when approached for stealing, and randomly shot off its gun killing Ms. Cooper and wounding another individual. Another shining example of how multi-culturalism does not work, and has robbed the life of yet another innocent young White woman.

Jeff Schoep, http://www.nsm88.com/rally/carpool-nebraska.html (last visited Nov. 7, 2006).

[11] The rally was called for the purpose of "calling attention to . . . the shooting death of Jenna Cooper." Butch Mabin, *Neo-Nazi Group's Rallies in Other Cities Were Sparsely Attended*, Lincoln Journal Star, July 9, 2004, at B1.

Alliance gathered in Omaha, using the death of Jenna Cooper to protest the "Mestizo and African invasion" of Nebraska.[12] From the day of the incident through the end of the trial, white supremacists, in connection with the trial, posted attacks against Blacks, Catholics, and Jews on the internet.[13]

The trial began on December 8th before an all white jury. The courtroom was filled with Cooper's family and friends, many of whom were wearing buttons showing a picture of a smiling Cooper and the words "Remember Jenna."[14] The State's first witness was Dr. Burton, the operating physician,

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[12] *See* William Muller, Nebraska: National Alliance Immigration Protest, http://www.nationalvanguard.org/story.php?id=4348 (last visited Nov. 7, 2006).

[13] *See, e.g., Lucky Iromuanya Shoots Lovely White Nebraska Soccer Star Jenna Cooper, available at* http://www.stormfront.org/archive/t-129310 (last visited Nov. 8, 2006); *Nigger Kills Nebraska Girl* (Dec. 6, 2004), *available at* http://www.vanguardnewsnetwork.com/letters/120604letters.htm (last visited Nov. 8, 2006). On the use of the Internet by white supremacists groups to further racist, anti-Catholic, and anti-Semitic views, *see, e.g.*, Stacy Finz, *A Web of White Power*, San Francisco Chronicle, Mar. 6, 2005, at A1.

[14] Iromuanya's counsel informed the court: "I think some of the family [are] starting to wear buttons with Jenna Cooper's face or photo or something like that . . . . So, I am going to move in limine that we exclude all the nice buttons or stuff like that, or with Lucky Iromuanya's or Nolan Jenkins' picture on them. The jury is going to be coming in and seeing this stuff pretty quickly." *State v. Iromuanya*, 719 N.W.2d 263, 284 (Neb. 2006). It was not until the third day of the trial that the judge instructed people not to wear the buttons in the courtroom. *See* Butch Mabin, *Iromuanya Seeks New Trial*, Lincoln Journal Star (Dec. 31, 2004), *available at* http://www.journalstar.com/articles/2004/12/30/local/doc41d49b67e141d065368411.txt (last visited Nov. 7, 2006) ("The buttons showed a picture of a smiling Jenna Cooper, with 'Remember Jenna' or words like that. [Judge] Colburn on the third day of the trial asked people not to wear the buttons in the courtroom . . . .").

who was called to verify Cooper's identity. Two witnesses later, the State called Jenna Cooper's mother, Mary Ellen Cooper. The State alleged that she too was necessary to identify the body. Defense counsel objected on the grounds that Mrs. Cooper's testimony was both highly prejudicial and extraneous, given that Dr. Burton had just testified and that the defense was willing to stipulate as to the victim's identity. Nonetheless, the trial court allowed the testimony.

The State projected a photograph onto a screen of Mrs. Cooper's bloodied daughter lying on the operating table, her breathing sustained by a tube.[15] When she was asked who appeared in the photograph, Mrs. Cooper "responded '[t]hat's my baby girl Jenna'" and broke down and wept.[16] Jurors, as well as members of the public sitting in the courtroom, also wept openly.[17]

Iromuanya's defense at trial rested on his lack of intent. His counsel argued that the evidence demonstrated that, after being wrongly accused of stealing, verbally threatened and then physically assaulted, Iromuanya fired a warning shot only because he believed he was about to be attacked for a second time. The effectiveness of Iromuanya's defense, however, was significantly hampered by the extremely prejudicial effect of Mrs. Cooper's testimony. The ability of Iromuanya to get a fair trial was compounded by the hatred towards Iromuanya that had been generated by the supremacist groups during the trial.

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[15] Shannon Henson, *Light Touch Wasn't Enough to Head Off Party's Fatal Shot*, Omaha World-Herald, Dec. 9, 2004, at B3. *See also* Trial testimony of Reginald Burton, MD (Trial Tr. vol. 3, 440); Trial testimony of Mary Ellen Cooper (Trial Tr. vol. 3, 501).

[16] *Iromuanya*, 719 N.W.2d at 280.

[17] *See* Christopherson, *supra* note 1 ("Her emotional testimony brought tears to the eyes of several jurors.").

On December 20, 2004, Iromuanya was convicted of second degree murder of Jenna Cooper, attempted second degree murder of Nolan Jenkins, and use of a deadly weapon to commit a felony. On direct appeal to the Supreme Court of Nebraska, Iromuanya argued that the admission of Mrs. Cooper's testimony was unconstitutionally prejudicial. The Court rejected this argument, holding that the trial court had not abused its discretion in admitting the testimony because the testimony was brief and the jurors were instructed at the beginning of the trial not to permit sympathy or prejudice to influence their verdict.[18]

Iromuanya, who is twenty-five years old, is currently serving the third year of a seventy-year sentence.

[18] *Iromuanya*, 719 N.W.2d at 282-83.

REASON FOR GRANTING THE WRIT

There is a Conflict of Authority Among the States on a Matter of Federal Constitutional Law: The Nebraska Supreme Court's Decision Below Conflicts With the Decisions of Other State Supreme Courts Regarding the Admission of Emotional Victim Identification Testimony by Family Members Over an Offer to Stipulate, Uncontested Identification Testimony by Other Witnesses, and a Due Process Objection by the Defendant.

Federal Rule of Evidence 403 and its state equivalents ensure a defendant's right to due process by guaranteeing that challenged evidence will not be admitted if the effect of the evidence will be more prejudicial than probative. "According to every federal appellate court that has considered the issue, and all the state courts applying analogous state evidence legislation, Rule 403 (or its state equivalent) provides the mechanism for handling due process concerns." Aviva Orenstein, *Deviance, Due Process, and the False Promise of Federal Rule of Evidence 403*, 90 Cornell L. Rev. 1487, 1517-18 (2005).[19] In Nebraska, this due

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[19] For state cases explaining that the state equivalent of Fed. R. Evid. 403 protects a defendant's right to due process, *see, e.g.*, *McLean v. State*, 934 So. 2d 1248, 1261 (Fla. 2006) (finding that the state equivalent of Fed. R. Evid. 403 protects "a defendant's right to due process" by excluding evidence that "will violate the defendant's right to a fair trial"); *State v. Taylor*, 689 N.W.2d 116, 135 (Iowa 2004) (finding no due process violation because "the challenged evidence was admissible under . . . rule 403"); *Sasser v. State*, 993 S.W.2d 901, 911 (Ark. 1999) (finding due process challenge redundant "because fairness to the party who opposes the admission of the evidence is built in to Rule 403"); *People v. Falsetta*, 986 P.2d 182, 192-93 (Cal. 1999) (noting that balancing test of Fed. R. Evid. 403 "saves federal rules 413 and 414 from attack on due process grounds" and that "California's section 1108 expressly incorporates a similar weighing process" under state equivalent to Rule 403); *State v. Fulton*, 742 P.2d 1208, 1218 (Utah 1987) ("We find that

process protection is codified in Rule 403 of the Nebraska Evidence Rules, Neb. Rev. Stat. § 27-403 (Reissue 1995).[20]

In the case below, Iromuanya invoked Nebraska Evidence Rule 403 when objecting to the testimony of the victim's mother on the ground that her highly emotional testimony was unfairly prejudicial, thereby denying him his right to a fair trial. The Nebraska Supreme Court held that the identification testimony of the victim's mother did not violate Iromuanya's due process rights despite: (1) the

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admission of testimony that met the Rule 403 standard did not deprive [the defendant] of his due process right to a fair trial."); *Mooney v. State*, 105 P.3d 149, 154 (Alaska Ct. App. 2005) (holding that the "stringent application of Evidence Rule 403 protects the defendant's due process rights"). *See also Redmond v. Solis*, No. C 04-0160 PJH (PR), 2006 U.S. Dist. LEXIS 54737, at *11 (N.D. Cal. July 24, 2006) (holding that, like Fed. R. Evid. 403, the California state equivalent "ensures that evidence admitted under section 1109 will not infringe on the right to a fair trial guaranteed under the Due Process Clause").

For federal cases explaining that Fed. R. Evid. 403 protects a defendant's right to due process, *see, e.g.*, *Johnson v. Elk Lake Sch. Dist.*, 283 F.3d 138, 155 (3d Cir. 2002) (noting that Rule 414 should be read together with Rule 403); *United States v. LeMay*, 260 F.3d 1018, 1027 (9th Cir. 2001) (concluding that Rule 414, subject to the Rule 403 balancing test, does not violate the Due Process Clause); *United States v. Mound*, 149 F.3d 799, 800-02 (8th Cir. 1998) (holding that Rule 413 does not violate due process so long as it is modified by 403); *United States v. Enjady*, 134 F.3d 1427, 1430-31 (10th Cir 1998) (holding that subject to the protections of Rule 403, Rule 413 does not violate the Due Process Clause); *United States v. Castillo*, 140 F.3d 874, 883 (10th Cir. 1998) ("application of Rule 403 to Rule 414 evidence eliminates the due process concerns posed by Rule 414").

[20] Nebraska Evidence Rule 403 is identical to the federal rule, and provides as follows: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

defendant's offer to stipulate to the victim's identity; (2) the prior, uncontested identification testimony by a non-related party; and (3) the lengthy[21] and highly emotional nature of the mother's testimony. This holding is in direct conflict with other state supreme courts and is thus appropriate for this Court's consideration.

The Supreme Courts of Florida, California, North Carolina, and Georgia apply a presumption that when the three elements present in the case below occur together, the defendant's right to due process is violated. In *Welty v. State*, 402 So. 2d 1159 (Fla. 1981), the Florida Supreme Court enunciated the "well-established rule in Florida that a member of the deceased victim's family may not testify for the purposes of identifying the victim where nonrelated, credible witnesses are available to make such identification." *Id.* at 1162. The Court went on to hold that admitting the testimony was harmless error only because "the . . . testimony was not of such a nature as to evoke the sympathy of the jury or to prejudice the defendant." *Id.* Similarly, in *Thompson v. Florida*, 565 So. 2d 1311 (Fla. 1990), the Florida Supreme Court held that "because the witness displayed no emotional outburst or other unduly prejudicial behavior to improperly influence the jury," the error of allowing identification testimony by the victim's father did not rise to a violation of due process. *Id.* at 1314.

The California Supreme Court has adopted an identical rule. In *People v. Bonin*, 765 P.2d 460 (Cal. 1989), the court held that the trial court's error in admitting the parents' testimony to establish the identity of the victims was only

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[21] The Nebraska Supreme Court characterized the mother's testimony as short, but this description is deceptive. By breaking up the discussion of the mother's testimony into separate subheadings, the Court misrepresents the actual length of her testimony, which was extensive and included a significant discussion of the victim's background, hobbies, and interests. *See Iromuanya*, 719 N.W. at 282-83.

harmless because it "had no potential to inflame the jurors and hence could not have exposed the defendant to prejudice." *Id.* at 484. *See also People v. Wash*, 861 P.2d 1107, 1126 (Cal. 1993) (noting that the defendant was not prejudiced by the victim's family member identification because the testimony "was factual and brief" and "[t]here were no emotional outbursts").

Similarly, the North Carolina Supreme Court upheld a finding that the defendant was not prejudiced by the admission of the testimony of the victim's mother, but only after expressly finding that there was "nothing in the record to support the defendant's contention that [she] cried while she was testifying." *State v. Moseley*, 445 S.E.2d 906, 912 (N.C. 1994). The Georgia Supreme Court has also acknowledged that a family member's testimony accompanied by an "emotional display" could "deprive [the defendant] of a fair trial." *James v. State*, 513 S.E.2d 207, 210 (Ga. 1999).

In addition to these state supreme court cases finding emotionally charged testimony by family members unconstitutionally prejudicial in the context of victim identification, a number of state appellate courts, including courts in Idaho and Oklahoma, have also recognized that such testimony violates a defendant's due process rights. *See State v. Buzzard*, 718 P.2d 1238, 1241 (Idaho Ct. App. 1986) (finding no prejudice from mother's testimony because "the record reflects no indication that her testimony was unduly emotional"); *Lambert v. State*, 984 P.2d 221, 237 (Okla. Crim. App. 1999) (finding no error in admitting mother's testimony because it was "straightforward and unemotional").

Although the majority of states take the position outlined above, Nebraska is joined by Illinois in taking the opposite view. In *People v. Toth*, 435 N.E.2d 748 (Ill. App. Ct. 1982),

the Appellate Court of Illinois cited an earlier decision by the Supreme Court of Illinois, which held that the state is not obligated to accept the defendant's stipulation as to the victim's identity in lieu of putting the victim's family member on the stand. The *Toth* court further held that "[s]uch [identification] evidence is admissible even when it is introduced through the testimony of a close relative who loses his composure." *Id.* at 754.

These cases demonstrate a clear conflict: on one side the Supreme Court of Nebraska and the Appellate Court of Illinois – holding that the admission of identification testimony by a family member is not unfairly prejudicial even if the defendant is willing to stipulate to the identity of the victim, a non-relative is available to testify, and the family member's testimony is highly emotional; and on the other side, the Supreme Courts of Florida, California, North Carolina, and Georgia – holding that where these three elements are present, the admission of the testimony violates due process. This conflict of authority among state supreme courts on a question of due process requires the intervention of this Court.

Moreover, the Court's intervention is especially important in this case, where the unfair prejudice of the mother's emotional testimony was heightened by fear and hate-mongering. White supremacist organizations used Iromuanya's case as a rallying point and did all they could to influence the community and the atmosphere surrounding the trial. The highly-charged atmosphere of the trial was also increased by the memorial buttons worn by Jenna Cooper's family and friends. These additional circumstances further highlight the due process deprivation suffered by Iromuanya and make more apparent the need for this Court's attention to his plight.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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November 9, 2006

APPENDIX

APPENDIX A — OPINION OF THE SUPREME COURT OF NEBRASKA FILED AUGUST 11, 2006

SUPREME COURT OF NEBRASKA

No. S-05-367

STATE OF NEBRASKA,

Appellee,

v.

LUCKY I. IROMUANYA,

Appellant.

Filed August 11, 2006

Stephan, J.

During a party at a Lincoln, Nebraska, residence in the early morning hours of April 25, 2004, Lucky I. Iromuanya fired a single shot from a derringer handgun which wounded Nolan Jenkins and killed Jenna Cooper. Following a jury trial, he was convicted on one count of attempted second degree murder and a related count of use of a weapon to commit a felony in connection with the injury to Jenkins, and one count of second degree murder and a related count of use of a weapon to commit a felony relating to the death of Cooper. He was sentenced to 25 to 35 years' imprisonment on the attempted second degree murder conviction and 10 to 20 years' imprisonment on the related weapons conviction. He received a sentence of not less than life imprisonment nor more than life imprisonment on the second degree murder conviction and 10 to 20 years' imprisonment on the weapons

conviction related to that charge. The four sentences were ordered to run consecutively. Iromuanya appeals from these convictions and sentences.

I. FACTS

On the evening of April 24, 2004, University of Nebraska-Lincoln students Cooper and Lindsey Ingram hosted a barbeque and party at the Lincoln residence they shared. Both women were members of the university's varsity soccer team. The evening was planned because spring soccer season had just ended and final examinations were approaching. An initial group of 10 to 15 people gathered in the early evening hours. In addition to Cooper and Ingram, this group included several of their current teammates and a former teammate who was visiting Lincoln. Also present were Jenkins, who was dating Ingram, and Jenkins' cousin. Throughout the evening hours, most of those present consumed alcohol, and some played "drinking games." Witnesses testified that the party attendees were drinking and having a good time but that the party was not "wild."

After midnight, more people arrived at the party in several groups. One group included Carrington Hartley and Nathanial Buss, who both practiced against the women's soccer team and were acquainted with Cooper and other players. Another group included Margaret Rugh, who had been given directions to the party by someone who accompanied Hartley and Buss. Rugh had been acquainted with Iromuanya for several weeks. Shortly after her arrival, Rugh called Iromuanya and asked him to come to the party. Iromuanya and his friend Aroun Phaisan, who had both been

at a downtown bar from approximately 11:45 p.m. until closing time, arrived at the party at approximately 1:30 a.m. in Phaisan's vehicle. Each had consumed one beer at the bar. When they arrived at the party, Phaisan parked his vehicle across the street from the house. Rugh greeted them outside the residence, took them inside, and introduced them to others who were present. Phaisan testified that during this time, people at the party were friendly to him and Iromuanya.

The events leading to the shooting began in the living room of the residence where a shot glass collection belonging to Cooper was displayed on open shelves. Several persons, including Phaisan and Iromuanya, had been standing in the general vicinity of the collection. Phaisan testified that he observed a Caucasian male handling some of the shot glasses. Buss testified that one of his friends showed him some shot glasses he had taken from the collection and asked for the keys to the vehicle which Buss had driven to the party. Buss gave him the keys. Buss knew that the collection belonged to either Ingram or Cooper, so he advised Ingram that "somebody," a male, had taken some shot glasses from the collection. Buss did not identify the individual by name but generally pointed him out to Ingram. Angered, Ingram confronted the individual. There is conflicting testimony as to whether this confrontation occurred in the house or in the driveway to the house. In any event, the individual admitted taking the shot glasses and placing them in a vehicle, and Ingram demanded that they go to the vehicle to retrieve them. In the meantime, Buss had gone to another room where Cooper was talking on a telephone and informed her of the incident. Upon hearing this, Cooper ended her telephone conversation and went outside. Buss followed shortly thereafter

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Inside the house, Phaisan had heard mention of the missing shot glasses and became concerned that he and Iromuanya might be accused of the theft because they had been standing in the area of the collection and were unknown to most of the persons at the party. He told Iromuanya that they should leave, and they exited the residence several minutes later. As Ingram was walking to the vehicle to retrieve the shot glasses, she observed Phaisan and Iromuanya leaving the house "very quickly." Knowing that they had been standing in the same area of the living room as the individual who had taken the glasses, and uncertain whether they had had any involvement in the incident, Ingram told them "very assertively" that no one could leave until everything was returned.

Adam Ellingson, who had been invited to the party by his friend Jenkins, had arrived at approximately 9 p.m. Later in the evening, he observed a group of people whom he did not know, including Phaisan and Iromuanya, standing in the general vicinity of the shot glass collection in the living room. He did not see anyone handle or take the shot glasses. At approximately 2 a.m., Ellingson went outside to check the windows of his vehicle, which was parked on the street in front of the house. Standing in the front yard, he observed a male whom he did not know come out of the house, followed closely by Ingram. Ellingson heard Ingram say that she wanted the shot glasses returned. During this conversation, Ellingson observed another male approaching the person to whom Ingram was talking and also observed Iromuanya and Phaisan come out of the house. He heard Ingram say that no one could leave until the shot glasses were returned. At that point, Ellingson went to the front door and called to Jenkins to come outside. He then returned to the front yard.

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When Jenkins came out of the house, he grabbed Iromuanya's sweatshirt with both hands, pushing him backward, and asked if he had stolen items from the house. Iromuanya tried to push Jenkins away, stating that he had done nothing, and the two scuffled for approximately 5 seconds. Ellingson stepped in and placed Iromuanya in a bear hug to keep him from Jenkins, and Phaisan ultimately separated Iromuanya from Ellingson. Hartley also helped by pushing Jenkins backward. As they were being separated, Iromuanya punched Jenkins in the back of the head. Ellingson testified that Iromuanya denied taking anything or doing anything wrong and said Ellingson could search him. Ellingson replied that he did not wish to search Iromuanya, but asked him not to leave until the shot glasses had been retrieved. Buss, who was also present during this confrontation, told Jenkins that Iromuanya had not taken the shot glasses.

After the scuffle, Brooke Bredenberg, one of the party guests, told Jenkins that Iromuanya was not the person who had taken the shot glasses. Seeing that Iromuanya "appeared to be very, very angry and appeared . . . like he still wanted to fight," Ingram approached him and told him several times to "calm down" and "chill out." Ingram testified that Iromuanya appeared not to pay attention to her and was focused on Jenkins, who was behind her. Iromuanya did not become calm. At that point, Ingram and Jenkins went to retrieve the shot glasses from the vehicle.

Buss, Hartley, Ellingson, and Cooper remained with Iromuanya. Phaisan was also in the area. Iromuanya was very upset, jumping around and repeating phrases such as "you

don't know me" and "[d]on't mess with me." Iromuanya repeatedly asked who had run up on him. Observing that Iromuanya "was obviously pretty perturbed, pretty upset," Hartley approached him in an effort to calm him. Hartley testified that Iromuanya did not appear to be afraid, but, rather, was "riled up. I mean I would parallel his behavior to a fighting cock. He was all riled up, he was ready to go basically." Hartley believed that because he and Iromuanya were members of the same racial minority group and because Hartley knew the people at the party and Iromuanya did not, Hartley could provide Iromuanya with assurance that "nobody would be messing with him, that he would be fine and he would calm down." Hartley tried to talk to Iromuanya, but Iromuanya was still focused on Jenkins and was still yelling. Iromuanya tried to get around Hartley, so Hartley grabbed his arm. Iromuanya gave Hartley a "cold stare," and Hartley released his grasp. Iromuanya kept moving back and forth and Hartley had to move correspondingly in order to keep himself between Iromuanya and the direction of Jenkins.

At that point, Cooper stepped in and attempted to speak to Iromuanya in order to calm him, but he continued yelling in the direction that Jenkins had gone. Buss had informed Cooper that Iromuanya had not taken the shot glasses. Iromuanya eventually acknowledged Cooper and seemed to become calmer, but then Cooper mentioned the shot glasses and he again became upset, stating that he had not taken them. Buss attempted to calm him down, telling him that everyone knew that he had not taken the shot glasses, but Iromuanya remained agitated. Buss then attempted to move Cooper away from Iromuanya. By that time, approximately 5 minutes had elapsed since the initial confrontation between Iromuanya and Jenkins.

Jenkins then walked back across the yard toward Iromuanya. He was walking at a normal pace, and some witnesses testified that his hand was outstretched, as if he intended to shake hands with Iromuanya. Jenkins testified that this was his intent. Bredenberg observed that Iromuanya appeared to become more upset as Jenkins approached, and she yelled to Iromuanya to "chill out, he's trying to apologize." Phaisan, who was nearby, heard this and thought there was no longer any reason for concern. Both Phaisan and Bredenberg thought Jenkins appeared calm as he approached Iromuanya. Hartley, who was also near Iromuanya, saw Jenkins coming and was initially worried that Iromuanya might think Jenkins was coming to hit him. But then Hartley heard Bredenberg shout out that Jenkins was coming to apologize and assumed that Iromuanya heard it too.

Jenkins approached within one step of Iromuanya, but not as aggressively as in the previous confrontation. Iromuanya then shoved Jenkins in the chest with both hands, knocking Jenkins backward. Hartley quickly stepped in between them and put his hands on Iromuanya's ribcage, and Phaisan reached his arm out in front of Jenkins to restrain him. Phaisan's back was to Iromuanya. Ellingson observed Iromuanya remove a handgun from the pocket of his trousers, "point it right at" Jenkins, who was approximately 5 feet away, and fire. Hartley, who was facing Iromuanya with his back to Jenkins, heard an explosion and then observed the handgun in Iromuanya's hand. Hartley grabbed Iromuanya's hand and pointed it toward the street. Hartley testified that at this point, Iromuanya yelled, "[Y]eah, what's up now? I'm the ghetto." Iromuanya and Phaisan then ran to Phaisan's

vehicle and drove away. Ellingson gave conflicting testimony regarding Hartley's position with respect to Iromuanya when the shot was fired.

After the shooting, Jenkins grabbed his head and walked toward the house. Buss testified that when he and Cooper had walked away from Iromuanya, he heard the shot and realized that Cooper had also been hit. He called out for emergency assistance. It was later determined that a single bullet entered Jenkins' left temple and exited above his left ear. The bullet then pierced Cooper's neck, causing her death.

When they were several blocks away from the scene of the shooting, Phaisan asked Iromuanya what had happened and he replied that he thought he had hit someone. At about that same time, Phaisan's cellular telephone rang and he recognized the caller as Rugh. Phaisan gave the telephone to Iromuanya and heard him say, "Charles Allen" and "you don't know me." Rugh had been in the house at the time of the shooting, but when she became aware of it, she suspected that Iromuanya was involved because she knew that he had carried a handgun in the past. Rugh testified that during their telephone conversation after the shooting, Iromuanya told her to say that his name was "Charles Allen" and that she did not know him. She testified that she told Iromuanya that he had shot a girl and that he said, "'A girl?'" She stated at trial that she was not sure whether he was surprised that a girl was shot or that someone was shot. Four days after the shooting, however, Rugh told an investigator that when she told Iromuanya that he shot a girl, his response was "'not a guy?'"

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Phaisan drove to his apartment and told Iromuanya to go home. Phaisan then went in and told his girl friend that Iromuanya had shot at someone and missed and hit some girl. Although at trial Phaisan stated that he did not know Iromuanya's intent at the time of the shooting, he admitted that immediately after the incident, it "made sense to [him]" Iromuanya had shot at someone, and that he thought Iromuanya had shot at Jenkins.

After initially identifying Iromuanya as "Charles Allen," Rugh informed police of his identity. Police were then dispatched to the Lincoln address where Iromuanya resided. Iromuanya was observed leaving the house, and after being engaged in conversation, he told officers he had been home all night. Iromuanya was patted down, and the weapon was found inside his right front jeans pocket. Chain of custody testimony at trial established that the handgun was in the same condition from the time of seizure until ballistics testing was conducted by Mark S. Bohaty, a criminalist employed by the Nebraska State Patrol crime laboratory. Bohaty identified the weapon as a single action .32-caliber derringer with two barrels in an "over and under" configuration. Bohaty testified that the weapon could only be fired by the separate steps of first cocking the hammer all the way back and then pulling the trigger. Test firing revealed a trigger pull of 9.5 pounds, which Bohaty described as "quite heavy" compared to other handguns. The shot which struck Jenkins and killed Cooper was fired out of the bottom barrel of the gun. There was an unfired round in the top barrel on which the primer was dimpled, indicating a misfire, although Bohaty could not say that this occurred on the day of the shooting. Test firing established that the derringer was relatively accurate.

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Iromuanya did not testify or present any evidence in his behalf. The State offered videotaped and handwritten statements given by Iromuanya to Lincoln police following his arrest on the day of the shooting. The statements were received without objection. In the videotaped statement which was played for the jury, Iromuanya described the initial confrontation with Jenkins and Iromuanya's anger at being accused of stealing the shot glasses. He admitted that he intentionally fired the shot, but stated that he did not intend to kill either Jenkins or Cooper and that he was attempting to shoot "to the side" in order to scare Jenkins away from him. In his handwritten statement, Iromuanya acknowledged that a girl told him that she knew he did not steal anything and that when "the guy," presumably Jenkins, approached him the second time, the girl said, "don't worry he just wants to apologize." He further wrote that when the approaching male remarked that Iromuanya had punched him, Iromuanya pushed him back and drew the weapon. When the male continued to approach, Iromuanya stated, "I shot by him hoping to scare him and his friends."

In his closing argument, defense counsel characterized the issue to be decided by the jury as "murder or manslaughter." He argued that the evidence did not establish that Iromuanya acted with the requisite intent to constitute second degree murder and attempted second degree murder, and he urged the jury to return a guilty verdict on a single count of manslaughter. The jury found Iromuanya guilty of all four charged offenses, and he was subsequently sentenced.

Additional facts will be set forth in our discussion of specific assignments of error.

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II. ASSIGNMENTS OF ERROR

Iromuanya assigns, consolidated, restated, and renumbered, that the trial court erred in (1) receiving testimony suggesting that Iromuanya was involved with a gang; (2) permitting Cooper's mother to testify and receiving certain portions of her testimony over his relevance objections; (3) not taking steps to shield jurors from "memorial buttons" worn by members of Cooper's family; (4) giving jury instruction No. 8, pertaining to the element of intent; (5) refusing to give three jury instructions requested by the defense; (6) failing to set aside the convictions based on insufficiency of the evidence; (7) ordering consecutive sentences on the two convictions for use of a weapon to commit a felony; and (8) imposing excessive sentences.

III. ANALYSIS

1. Claimed Suggestion of Street Gang Involvement

(a) Additional Facts

Phaisan testified that after the initial altercation, he saw Iromuanya being "pushed back" away from Jenkins by another person. When asked if the other person was Hartley, Phaisan responded that he thought so, but that the person had a different hairstyle on the night of the shooting than at the trial. The State then asked Phaisan whether Iromuanya had a different hairstyle that evening, to which Phaisan responded, "I think his hairstyle — I think it was braided. . . ." At that point, Iromuanya objected on the basis of relevance, raising concerns that the prosecution was trying to insinuate

that he was in a gang, and the objection was sustained. Iromuanya did not move to strike, make a motion for a mistrial, or ask that the jury be instructed in any manner with respect to the remark.

During Rugh's testimony, she was asked who, other than Phaisan, Iromuanya normally hung out with. The trial court overruled Iromuanya's relevancy objection, and Rugh testified that Iromuanya told her that "he hung — I don't know if he hung out with his — like went and played basketball with his boys. . . . He went and played basketball with his boys, his friends."

Rugh testified that after the shooting, she lied to police and told them Iromuanya's name was "Charles Allen" because Iromuanya told her to and she was scared. During her testimony, she stated that she did not go back to her dormitory room the night of the shooting because she was "scared." When pressed by the State to explain what she was afraid of, she said she was afraid that somebody, "maybe some of [Iromuanya's] friends," would do something to her. Iromuanya objected to this testimony, arguing it was irrelevant and more prejudicial than probative. The objections were overruled.

(b) Standard of Review

In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility. Where the Nebraska Evidence Rules commit

the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion. *State v. Grosshans*, 270 Neb. 660, 707 N.W.2d 405 (2005); *State v. Sanders*, 269 Neb. 895, 697 N.W.2d 657 (2005).

The exercise of judicial discretion is implicit in determinations of relevancy under Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 1995), and prejudice under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995), and a trial court's decision regarding them will not be reversed absent an abuse of discretion. *State v. Davlin*, *ante* p. 139, ___ N.W.2d ___ (2006); *State v. Sanders*, *supra*; *State v. Mowell*, 267 Neb. 83, 672 N.W.2d 389 (2003).

(c) Resolution

The testimony about Iromuanya's hairstyle on the day of the shooting was clearly irrelevant, as there was no issue in this case as to his identity. The district court properly sustained the relevance objection. Because Iromuanya did not request additional action from the court, he cannot now complain of error in that regard. When an issue is raised for the first time in an appellate court, it will be disregarded inasmuch as a lower court cannot commit error in resolving an issue never presented and submitted to it for disposition. *State v. McPherson*, 266 Neb. 715, 668 N.W.2d 488 (2003); *State v. Reed*, 266 Neb. 641, 668 N.W.2d 245 (2003). Moreover, it is unclear how the mere fact that a person wears his hair in braids implicates gang involvement. The record includes nothing to correlate braided hair with street gangs; indeed, it includes no specific reference to street gangs

whatsoever. Thus, Phaisan's answer standing alone could not have resulted in prejudice to Iromuanya.

Rugh's testimony concerning her knowledge of who Iromuanya "hung out with" was relevant to the issue of how well she knew him, which would affect the credibility of her testimony at trial and her statements made the night of the shooting. In addition, her brief reference to "his boys," standing alone, was not prejudicial to Iromuanya. Rugh quickly explained that by "boys" she meant "friends." There is nothing in the record to correlate the phrase "his boys" with street gangs. During the cross-examination of Ellingson in which defense counsel sought to establish his friendship with Jenkins, counsel asked, "Nolan's one of your boys, right?" The only inference with respect to the phrase which can be drawn from this record is that it is used by young people in reference to male friends.

The testimony that Rugh was afraid of Iromuanya's friends was relevant to the issue of her credibility, which was challenged during trial. Rugh's trial testimony differed from the statements she had previously given to police regarding the shooting. In her prior statements, she stated that when she told Iromuanya that he had shot a girl, he replied, "'not a guy?'" At trial, however, she testified that Iromuanya was surprised that someone was shot, not that a girl was shot. The fact that she was afraid after speaking to Iromuanya after the shooting is relevant to the jury's evaluation of which of Rugh's versions of events to believe. In addition, her testimony supports an inference that Iromuanya attempted to intimidate her into giving false information to the police soon after the shooting had

occurred. In this respect, we have held that a defendant's attempted intimidation of a witness is evidence of the defendant's conscious guilt that a crime has been committed and is a circumstance from which an inference may be drawn that the defendant is guilty of the crime charged. See *State v. Clancy*, 224 Neb. 492, 398 N.W.2d 710 (1987), *disapproved on other grounds, State v. Culver*, 233 Neb. 228, 444 N.W.2d 662 (1989). See, also, *State v. Freeman*, 267 Neb. 737, 677 N.W.2d 164 (2004). The trial court did not abuse its discretion in receiving this testimony.

Alternatively, Iromuanya argues that the combined effect of the admission of the testimony regarding his hairstyle, his "boys," and Rugh's fear of his friends amounted to prejudicial error because it suggested that he had gang ties. In support of this argument, he cites *Thomas v. State*, 625 So. 2d 1149 (Ala. Crim. App. 1992), and *People v. Parrott*, 40 Ill. App. 3d 328, 352 N.E.2d 299 (1976). *Thomas* was reversed by the Supreme Court of Alabama in *Ex parte Thomas*, 625 So. 2d 1156 (Ala. 1993). In reversing the case, however, the Alabama Supreme Court agreed with the premise that purposefully elicited testimony directly indicating gang membership was highly prejudicial to a defendant. *Ex parte Thomas, supra.* In that case, the state directly asked a witness about the defendant's gang ties in a case involving a driveby shooting after the defendant had specifically raised the impropriety of such questions. The Alabama Supreme Court found this was prejudicial error. *Id.* Similarly, in *Parrott*, the court held that in an action charging illegal sale of guns, it was irrelevant and highly prejudicial to allow evidence that the sale was made to street gangs. The instant case differs significantly from both

Thomas and *Parrot* because, as noted above, the record includes no explicit reference to street gangs. We conclude that the evidence, even considered cumulatively, does not support Iromuanya's assignments of error.

2. Testimony of Mary Ellen Cooper

(a) Additional Facts

The State's first witness was Dr. Reginald Burton, a trauma surgeon who treated Cooper for the gunshot wound. Asked to identify a person shown receiving medical treatment in a photograph, Burton testified: "That appears to be [Cooper]." The photograph was received into evidence without objection. With respect to a similar photograph, Burton testified, "that would be [Cooper] again." That photograph was also received into evidence without objection.

Mary Ellen Cooper (Ellen) of Louisville, Kentucky, is Cooper's mother. Prior to trial, Iromuanya filed a "Motion to Exclude Witness" in which he asked the court to determine the propriety of permitting Ellen to testify at trial. The motion was argued at a pretrial hearing and was denied. On the first day of trial, the State called Ellen as its third witness. Before Ellen testified, defense counsel stated that he was renewing the objection made in the pretrial motion "to preserve my [rule] 403 objection." The trial court made no specific ruling at that time, but permitted the State to call Ellen as a witness.

Ellen testified without objection that Cooper was born on September 28, 1982, and that she also has a son who was

2 years older than Cooper. Over a relevance and rule 403 objection, Ellen testified that Cooper's interests included various sports, that she was involved in many school activities, and that she was "just an incredibly, incredibly well-rounded person." Also over a defense objection, Ellen testified as to Cooper's reasons for coming to the University of Nebraska-Lincoln to play soccer and the course of study which Cooper was pursuing at the university. In overruling the objection to this testimony, the court noted that it was relevant to show "how [Cooper got] here and that this was a soccer party and the people that are at the party and why they're there."

Without objection, Ellen explained Cooper's hobby of collecting shot glasses. She also testified that she left Lincoln on the morning of April 24, 2004, after staying with Cooper and Ingram for approximately 10 days. She testified that she had a telephone conversation with Cooper that evening, but the court sustained a hearsay objection regarding its substance.

Ellen testified that she returned to Lincoln on the afternoon of April 25, 2004, after learning of the shooting, and that she was taken to the hospital to see Cooper. At this point, Iromuanya's counsel objected and a sidebar conference was held, during which the prosecutor advised the court that he intended to have Ellen identify one of the photographs which was received during Burton's testimony. The court indicated that it would allow the testimony for that purpose. When shown the photograph, Ellen responded, "That's my baby girl Jenna." In a sidebar conference immediately thereafter, defense counsel made the following statement:

> I'd like the record to reflect that, that was fairly dramatic there at the end and [Ellen] broke down into tears as [counsel] showed her a picture that's been received into evidence. So, for the record, I'm objecting to when [Ellen] started breaking down and crying. And I think this is also going to relate to my [rule] 403 motion, as she goes back there and sits in the courtroom. So that's all I have to say. Thank you.

Neither the prosecutor nor the trial court responded to this statement. There was no motion for a mistrial nor any further direct or cross-examination, and Ellen was excused and released from the sequestration order.

In denying Iromuanya's motion for new trial, the trial court further explained its rulings with respect to the testimony of Ellen as follows:

> A review of the record reflects that most of the testimony of Ellen Cooper was received without objection. Many of the objections made during her testimony were sustained. This court attempted to limit her testimony to areas relevant to the issues in the trial. The court notes that Ellen Cooper was one of the first witnesses called during the trial. She testified that Jenna Cooper had been collecting shot glasses for some time, similar to her aunt's Kentucky Derby glass collection. The evidence at trial revealed that shot glasses had been stolen from Jenna Cooper's house. There was a strong reaction from Jenna Cooper and her

roommate Lindsay Ingram when it was discovered that the shot glasses had been stolen. This testimony put perspective on the reaction of the victims as these weren't just glasses that had been stolen, they were glasses that were part of a collection that had strong sentimental value to Jenna Cooper. The testimony about Jenna Cooper being a soccer player and an engineering major simply put in perspective the reason for the party at her house and explained who was there and why. It was the end of the Spring season and just before finals. The court notes that there was no objection to the testimony about the shot glass collection. There was no objection to Ellen Cooper testifying that she had been to Lincoln to watch Jenna Cooper play soccer and had left on April 24 to return to Louisville. There were no objections to numerous other questions asked of Ellen Cooper concerning returning to Lincoln after she had been informed that Jenna Cooper had been shot. [Iromuanya] did object to Ellen Cooper identifying her daughter in a photograph. The court notes that this photograph had already been received into evidence during the testimony of the treating physician. There was no testimony that the treating physician knew Jenna Cooper prior to her being brought to the hospital. . . . The court notes that this was a photograph of Jenna Cooper at the hospital which had already been received into evidence, and was not a family photograph or a "Senior" picture. The State bears the burden of proving beyond a reasonable doubt each and

every element of the crime charged, including proving the identity of the victim. (It is customary to have someone who knows the victim to identify the body.) As noted, Ellen Cooper was one of the first witnesses to be called after the doctor testified. If no one who knew Jenna Cooper identified the photograph, could an argument be made that the State had failed to identify the victim since the doctor did not know whether the person he treated was Jenna Cooper or some other gunshot victim? Arguably, circumstantial evidence could have been introduced to prove identity or some other witness could have later identified Jenna Cooper. If it was unnecessary to allow Ellen Cooper to identify her daughter as the person in the photograph, it is the conclusion of the court that this was not so prejudicial as to have denied [Iromuanya] his right to a fair trial, and does not require this court to grant him a new trial. The court notes that on numerous occasions the court reminded the jur[ors] that they must not let emotion, sympathy, or prejudice play a role in their deliberations.

(b) Standard of Review

The exercise of judicial discretion is implicit in determinations of relevancy under rule 401 and prejudice under rule 403, and a trial court's decision regarding them will not be reversed absent an abuse of discretion. *State v. Sanders*, 269 Neb. 895, 697 N.W.2d 657 (2005); *State v. Mowell*, 267 Neb. 83, 672 N.W.2d 389 (2003).

(c) Resolution

The district court did not err in overruling the defense motion to preclude Ellen's testimony in its entirety. Our rules of evidence provide: "Every person is competent to be a witness except as otherwise provided in these rules." Neb. Evid. R. 601, Neb. Rev. Stat. § 27-601 (Reissue 1995). The issue on appeal, therefore, is whether the district court erred in overruling defense objections and permitting Ellen to testify on specific substantive issues as to which error has been assigned.

(i) Identification

In a homicide prosecution, photographs of a victim may be received into evidence for the purpose of identification, to show the condition of the body or the nature and extent of wounds and injuries to it, and to establish malice or intent. *State v. Faust*, 265 Neb. 845, 660 N.W.2d 844 (2003); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Clark*, 255 Neb. 1006, 588 N.W.2d 184 (1999). Here, there was no objection to admission of the photographs depicting Cooper or the identification by the physician who treated her. The issue is whether the district court erred in permitting additional identification by a family member.

Iromuanya urges that we adopt a rule similar to that followed by Florida courts which precludes a family member of the deceased from identifying a homicide victim unless there are independent reasons to call the family member. See *Welty v. State*, 402 So. 2d 1159 (Fla. 1981). The basis for this rule, as articulated by the Supreme Court of Florida,

is to "assure the defendant as dispassionate a trial as possible and to prevent interjection of matters not germane to the issue of guilt." *Id.* at 1162. Iromuanya contends that application of this rule to the instant case would have and should have prevented Ellen from giving the emotional identification of Cooper.

We have not previously addressed the specific issue of whether a family member should be precluded from identifying the victim of a homicide case. Numerous jurisdictions other than Florida have no per se rule against family member identification of murder victims. See, *People v. Combs*, 34 Cal. 4th 821, 101 P.3d 1007, 22 Cal. Rptr. 3d 61 (2004); *Grayson v. State*, 824 So. 2d 804 (Ala. Crim. App. 1999); *People v. Harris*, 177 Misc. 2d 903, 679 N.Y.S.2d 242 (1998); *Matchett v. State*, 941 S.W.2d 922 (Tex. Crim. App. 1996); *State v. Moseley*, 336 N.C. 710, 445 S.E.2d 906 (1994); *State v. Buzzard*, 110 Idaho 800, 718 P.2d 1238 (Idaho App. 1986). These jurisdictions instead generally apply principles of rules 401 and 403 in determining the admissibility of the testimony on a case-by-case basis. See *id.* In doing so, they note that family member identification testimony is relevant because it is the State's burden to prove the identity of the victim and that such burden need not be met simply by a stipulation between the parties. See *id.* We note that even under the Florida rule, identification of a homicide victim by a family member can be considered harmless error in certain circumstances, as was the case in *Welty v. State*, *supra*.

We decline to adopt a bright-line rule on this issue, and instead, we align with those jurisdictions which utilize rules

401 and 403 to determine whether identification of a homicide victim by a family member is permissible under specific circumstances. The fact that Ellen became emotional when she made the identification must be considered in this analysis. However, Ellen's testimony was brief and occurred on the first day of a 9-day trial in which she was the third of 29 witnesses. Jurors were instructed at the beginning of jury selection and again upon final submission of the case that they should not permit sympathy or prejudice to influence their verdict. As noted, our review of this issue is for abuse of discretion. Based upon our review of the record and the reasoning given by the district court for receiving the identification testimony, we cannot conclude that it abused its discretion in doing so.

(ii) Cooper's Background and Accomplishments

Iromuanya argues that Ellen's testimony regarding Cooper's background and accomplishments was irrelevant and "did nothing but create bias and prejudice and had no relationship to . . . guilt or innocence." Brief for appellant at 35. His argument is premised upon the principle that a defendant "'has the right to expect that his fate will be fixed with reference only to the circumstances of the crime with which he is charged.'" *People v. Hope*, 116 Ill. 2d 265, 278, 508 N.E.2d 202, 208, 108 Ill. Dec. 41, 47 (1986), quoting *People v. Gregory*, 22 Ill. 2d 601, 177 N.E.2d 120 (1961).

Evidence is relevant when it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. *State v. Duncan*, 265

Neb. 406, 657 N.W.2d 620 (2003). Portions of Ellen's testimony about Cooper were clearly relevant to the circumstances of the crimes with which Iromuanya was charged. The fact that Cooper came to the University of Nebraska-Lincoln to play soccer was relevant to the circumstances under which she and Iromuanya came to be in the same place at the same time and was established by the testimony of many witnesses in addition to Ellen. The testimony that Cooper's hobby was collecting shot glasses, to which no objection was made, was relevant to the circumstances which led directly to the fatal shooting.

However, Ellen's testimony regarding Cooper's other hobbies and interests and Cooper's aspirations as a soccer player does not fall within the legal definition of relevancy in this criminal prosecution. Neither does Ellen's testimony that Cooper was a good student and a well-rounded person, as none of this evidence makes it more or less probable that Iromuanya committed the crimes with which he was charged. Accordingly, the trial court erred in receiving this evidence.

In a jury trial of a criminal case, an erroneous evidentiary ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt. *State v. Robinson*, 271 Neb. 698, 715 N.W.2d 531 (2006); *State v. Neal*, 265 Neb. 693, 658 N.W.2d 694 (2003). Harmless error exists when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in reaching a verdict adverse to a substantial right of the defendant. *State v. Robinson*, *supra*; *State v. Freeman*, 267 Neb. 737, 677 N.W.2d 164 (2004). Harmless error review looks to the basis on which

the jury actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error. *State v. Freeman, supra.*

We conclude that the error was harmless. The record reflects undisputed evidence that Iromuanya fired the shot which wounded Jenkins and killed Cooper. The critical issue at trial was whether he did so with an intent to kill Jenkins so as to constitute attempted second degree murder and second degree murder under the doctrine of transferred intent. On this point, there was testimony from several eyewitnesses regarding the circumstances of the shooting, including detailed accounts of Iromuanya's words and actions before and after the shot was fired. The jury also saw and heard Iromuanya's account of the events in the statements he gave to police. The jury was instructed that it was to determine intent from Iromuanya's "words and acts and all of the surrounding circumstances." While legally irrelevant, Ellen's brief testimony regarding Cooper's background had no prejudicial bearing on the issue of intent.

In addition, witnesses other than Ellen testified without objection that Cooper was an accomplished student-athlete who enjoyed a good relationship with her teammates. It is certainly possible that the jury could have felt sympathy for Cooper, just as any jury could feel sympathy for the innocent victim of a homicide. That is the reason why jurors are routinely instructed, as was done in this case, that they must not allow sympathy or prejudice to influence their verdict. Absent evidence to the contrary, it is presumed that a jury

followed the instructions given in arriving at its verdict. *State v. McPherson*, 266 Neb. 715, 668 N.W.2d 488 (2003); *State v. Harrold*, 256 Neb. 829, 593 N.W.2d 299 (1999). We conclude from the entire record that the verdict was surely unattributable to the erroneously received testimony of Ellen, and the error was therefore harmless.

(iii) Attendance at Trial

The remaining assignment of error with respect to Ellen is that the trial court erred in allowing her to be present in the courtroom after her testimony was concluded. This assignment, however, is not argued in Iromuanya's brief. Errors that are assigned but not argued will not be addressed by an appellate court. *State v. Conover*, 270 Neb. 446, 703 N.W.2d 898 (2005); *State v. Marshall*, 269 Neb. 56, 690 N.W.2d 593 (2005).

3. "Memorial Buttons" Worn by Spectators

(a) Additional Facts

The record reflects that jury selection lasted 2 days. Prior to the resumption of voir dire examination on the second day, and out of the presence of the prospective jurors, Iromuanya's counsel informed the court:

> I think some of the family [are] starting to wear buttons with Jenna Cooper's face or photo or something like that. . . . So, I am going to move in limine that we exclude all nice buttons or stuff like that, or with Lucky Iromuanya's or Nolan

> Jenkins' picture on them. The jury is going to be coming in and seeing this stuff pretty quickly.

The prosecutor commented that he did not notice anything, "but I didn't talk to them this morning." When the court asked who was wearing a button, Iromuanya's counsel stated, "I thought the lady that was just talking." The prosecutor replied, "She has an overcoat and I think she's taken her overcoat off." The court then asked to see counsel in chambers, but we are presented with no verbatim record of that conference. When the verbatim record resumed, Iromuanya's counsel made the following statement:

> Your Honor, as I was walking out, I noticed that at least one, I believe, family member of Jenna Cooper's has some buttons on her coat. I am moving in limine to exclude those buttons. . . .
>
> Again, for the record, as I was walking out, I believe a female lady in the gallery has a coat with a couple of pictures. I believe that to be Jenna Cooper, I didn't look real close. Then, once we took a break, apparently she went outside, was around the jury again, walked back in with her coat on, so those buttons were visible.

When asked for case law in support of his position, Iromuanya stated:

> I don't have any case law, except if it continues, if we're heading down this direction, at some point if there's an influence on the jury, yes, there's

> going to be a mistrial. But, do I have any specific case law as to buttons? No, but I can find case law that when sympathy overcomes the jury or anybody tries to persuade the jury, that's a mistrial.

Iromuanya did not move for a mistrial on these grounds during the trial. The court took the oral motion in limine under advisement, but the record does not reflect a ruling on the motion.

In his motion for new trial and a supporting affidavit received over the State's objection, Iromuanya's counsel stated that he recalled that "it was not until the third day of trial after the entire panel had been exposed to this inadmissible evidence that the Court requested visitors not wear these memorials in the Courtroom." In denying the motion for new trial, the trial court stated: "There is no evidence before the court that any juror ever saw any of these 'buttons' or that any juror was influenced in any way by any button."

(b) Standard of Review

The responsibility for conducting a trial in an orderly and proper manner for the purpose of ensuring a fair and impartial trial rests with the trial court, and its rulings in this regard will be reviewed for an abuse of discretion. See *State v. Boppre*, 234 Neb. 922, 453 N.W.2d 406 (1990).

(c) Resolution

The colloquy between the trial court and counsel regarding the wearing of buttons by spectators occurred

during the jury selection proceedings, before the jury was sworn and presentation of evidence began. Because the record does not reflect the court's ruling on the oral motion in limine, we are unable to review it. It is incumbent upon the appellant to present a record which supports the errors assigned. *State v. Taylor*, 262 Neb. 639, 634 N.W.2d 744 (2001). Absent such a record, as a general rule, the decision of the lower court as to those errors is to be affirmed. *State v. Quintana*, 261 Neb. 38, 621 N.W.2d 121 (2001).

Although defense counsel indicated during jury selection that the wearing of buttons could lead to a mistrial, no such motion was filed during the trial. When a party has knowledge during trial of irregularity or misconduct, the party must timely assert his or her right to a mistrial. One may not waive an error, gamble on a favorable result, and, upon obtaining an unfavorable result, assert the previously waived error. *State v. Hudson*, 268 Neb. 151, 680 N.W.2d 603 (2004); *State v. Fahlk*, 246 Neb. 834, 524 N.W.2d 39 (1994).

The inadequacy of the record to support this assignment of error is illustrated by comparison to *Musladin v. Lamarque*, 427 F.3d 653 (9th Cir. 2005), *cert. granted sub nom.* ___ U.S. ___, 126 S. Ct. 1769, 164 L. Ed. 2d 515 (2006), the single case cited by Iromuanya in support of his argument. *Musladin* involved a murder prosecution in which the defendant contended he killed the victim in self-defense. There was evidence that on each day of the 14-day trial, at least three members of the victim's family sat in the front row of the gallery, directly behind the prosecution and in clear view of the jury, wearing buttons several inches in diameter displaying a photograph of the victim. The trial court

denied a defense request to instruct the spectators to refrain from wearing the buttons. A divided panel of the Ninth Circuit Court of Appeals held that the defendant was entitled to a writ of habeas corpus because the wearing of the buttons created an unacceptable risk that impermissible factors came into play, which was inherently prejudicial. See *Estelle v. Williams*, 425 U.S. 501, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976).

In contrast to the detailed evidence of spectators wearing buttons in *Musladin*, the record in this case gives us little information on which to evaluate Iromuanya's assigned error. We do not know how many spectators wore buttons, where they were seated in the courtroom, the size and specific content of the buttons, or the precise nature of the trial court's ruling with respect to the oral motion made by Iromuanya's counsel. From the scant record before us, we cannot conclude that the trial court abused its discretion with respect to the wearing of buttons by spectators.

4. Jury Instructions

(a) Additional Facts

Iromuanya's counsel objected to the district court's proposed jury instruction regarding intent because of the following language included in the instruction: "You may infer, but are not required to infer, that a person intended a reasonably probable result of his or her act." The objection was overruled, and the instruction was given to the jury as instruction No. 8.

Appendix A

At the instruction conference, Iromuanya's counsel presented a proposed instruction asserting Iromuanya's position that his acts made him guilty of "involuntary manslaughter, not murder and attempted murder," and further stating:

> Unless you are convinced beyond a reasonable doubt that this is false, you must find [Iromuanya] not guilty of the attempted murder and murder charges. If a reasonable doubt exists whether Lucky Iromuanya intended anything short of killing Nolan Jenkins, then you must find [Iromuanya] not guilty of attempted murder and murder[.]

The district court declined to give the proposed instruction, noting that its content was included in other instructions given. Iromuanya's counsel also requested that the court instruct the jury that malice is an element of second degree murder, and the court denied the request. Iromuanya's counsel further submitted a proposed self-defense instruction, which the district court declined to give.

(b) Standard of Review

Whether jury instructions given by a trial court are correct is a question of law. When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below. *State v. Sanders*, 269 Neb. 895, 697 N.W.2d 657 (2005). In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to

show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *State v. Grosshans*, 270 Neb. 660, 707 N.W.2d 405 (2005); *State v. Anderson*, 269 Neb. 365, 693 N.W.2d 267 (2005).

To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction. *State v. Mason*, 271 Neb. 16, 709 N.W.2d 638 (2006); *State v. Wisinski*, 268 Neb. 778, 688 N.W.2d 586 (2004).

(c) Resolution

(i) Instruction No. 8

The first paragraph of instruction No. 8 instructed the jury as follows: "Intent is an element of the crimes charged against the defendant. In deciding whether the defendant acted with intent, you should consider his words and acts and all of the surrounding circumstances." This language tracks that of NJI2d Crim. 5.1. However, the pattern instruction does not include the second paragraph of instruction No. 8, regarding the permissive inference that a person intends the reasonably probable result of an act, to which Iromuanya objected and has now assigned error.

This court has held that "[f]rom circumstances around a defendant's voluntary and willful act, a finder of fact may

infer that the defendant intended a reasonably probable result of his or her act." *State v. Keup*, 265 Neb. 96, 109, 655 N.W.2d 25, 36 (2003). Thus, intent to kill may be inferred from deliberate use of a deadly weapon in a manner reasonably likely to cause death. *State v. Rokus*, 240 Neb. 613, 483 N.W.2d 149 (1992). See *State v. Keup*, *supra*. Iromuanya correctly points out that our holding in *Rokus* was in the context of determining the sufficiency of the evidence to support a conviction for second degree murder, and the same is true of the holding in *Keup*. While Iromuanya does not contend that the language in question is an incorrect statement of the law, he argues that its inclusion in the jury instruction was prejudicial because it allowed jurors "to infer that since Iromuanya said he pulled the trigger, and the consequence was hitting Jenkins in the head, he intended that result." Brief for appellant at 38.

In reaching the holding in *Rokus* that intent may be inferred from deliberate use of a deadly weapon in a manner reasonably likely to cause death, this court relied in part upon *United States v. Kimmel*, 777 F.2d 290, 292 (5th Cir. 1985), in which the court approved the following jury instruction:

> "As a general rule it is reasonable to infer that a person ordinarily intends the natural and probable consequences of his knowing acts. The jury may draw the inference that the accused intended all the consequences which one standing in like circumstances and possessing his knowledge should reasonably have expected to result from any act of conscious omission and any such inference drawn is entitled to be considered by

> the jury in determining whether or not the government has proved beyond a reasonable doubt that the defendant did possess the required intent."

The court reasoned that because the instruction permitted but did not require an inference of intent, it did not have the constitutionally impermissible effect of relieving the government of its burden to prove intent as an element of the crime.

Similarly, in this case, the challenged instruction stated a permissive inference which could be drawn from Iromuanya's admittedly knowing and intentional act of firing the handgun. The jury was presented with two versions of what occurred: Iromuanya's statement to police that he "shot by him" with the intent of scaring, but not killing, Jenkins and testimony from other witnesses that Iromuanya pointed the weapon in Jenkins' direction before firing. The challenged portion of instruction No. 8 did not preclude the jury from considering and accepting Iromuanya's version of the shooting. Rather, it correctly informed the jury that if it found that Iromuanya pointed the weapon at Jenkins and fired, it *could* infer an intent to kill despite the fact that such intent was not expressly stated.

Jury instructions must be read as a whole, and if they fairly present the law so that the jury could not be misled, there is no prejudicial error. *State v. Williams*, 269 Neb. 917, 697 N.W.2d 273 (2005); *State v. Anderson*, 269 Neb. 365, 693 N.W.2d 267 (2005); *State v. Weaver*, 267 Neb. 826, 677 N.W.2d 502 (2004). In this case, instruction No. 3 clearly informed the jury that the intent element with respect to the

charge of attempted murder of Jenkins meant the intent to "cause the death of Nolan Jenkins." Instruction No. 5 informed the jury that the intent element with respect to the charged murder of Cooper was the intent to kill. Further, instruction No. 7 informed the jury of the doctrine of transferred intent and specifically stated that if it found Iromuanya "intended to kill Nolan Jenkins," the element of intent was satisfied as to Cooper even if he did not "intend to kill" her. The first sentence of instruction No. 8 informed the jury that in determining whether Iromuanya acted with the requisite intent, it should consider "his words and acts and all of the surrounding circumstances." We conclude that the permissive inference language in instruction No. 8 was a correct statement of the law which did not prejudice Iromuanya.

(ii) Requested "Theory of Defense" Instruction

It is not error for a trial court to refuse to give a party's requested instruction where the substance of the requested instruction was covered in the instructions given. *State v. Mason*, 271 Neb. 16, 709 N.W.2d 638 (2006); *State v. Gales*, 269 Neb. 443, 694 N.W.2d 124 (2005). If there is evidence to support it, a defendant is entitled to have an instruction given on his theory of the case. See *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984). However, such an instruction is not needed where other instructions adequately cover the defense theory. *State v. Fitzgerald*, 1 Neb. App. 315, 493 N.W.2d 357 (1992).

The instructions given by the court in this case included an instruction on manslaughter as a lesser-included offense

of second degree murder and repeatedly informed the jury of the State's burden to prove guilt beyond a reasonable doubt. We conclude that the instructions given by the court adequately covered all pertinent matters included in Iromuanya's proposed "theory of defense" instruction.

Based on *People v Lester*, 406 Mich. 252, 277 N.W.2d 633 (1979), Iromuanya argues that he was nevertheless entitled to a separate instruction on his theory of defense. In *Lester*, the Michigan Supreme Court held that a separate instruction on accidental homicide was mandated whenever the defense requested an instruction on the theory and there was evidence to support it, arguably even if the jury instructions given implicitly covered the theory. Notably, however, *Lester* has been overruled, and Michigan now applies a harmless error analysis when reviewing a failure to give an accidental homicide instruction. *People v. Hawthorne*, 474 Mich. 174, 713 N.W.2d 724 (2006). We have taken a similar approach. In *State v. Brown*, 220 Neb. 849, 374 N.W.2d 28 (1985), we stated that a separate accidental homicide instruction was not necessary when the intent instruction given to the jury adequately covered the issue. Thus, even if the proposed theory of the case instruction offered by Iromuanya was an attempt to help the jury distinguish between intent and accident, in this case, the jury was clearly instructed that "[i]ntentionally" meant "willfully or purposely, not accidentally or involuntarily."

For these reasons, we conclude that the district court did not err in refusing to give Iromuanya's proposed instruction stating his theory of defense.

Appendix A

(iii) Requested Malice and Self-Defense Instructions

Iromuanya argues that the district court erred in failing to either instruct the jury on malice as an element of second degree murder or give his requested self-defense instruction. Malice is not an element of second degree murder, and the district court therefore did not err in refusing to instruct that it was. Neb. Rev. Stat. § 28-304(1) (Reissue 1995); *State v. Davlin*, 263 Neb. 283, 639 N.W.2d 631 (2002); *State v. Redmond*, 262 Neb. 411, 631 N.W.2d 501 (2001); *State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998).

In *Burlison*, we overruled prior cases which held that malice was an essential element of second degree murder. Iromuanya's argument that he was entitled to a self-defense instruction if the court declined to instruct on malice as an element is based on the following language in *Burlison*:

> We are now persuaded that when read in conjunction with Neb. Rev. Stat. § 28-102(1) (Reissue 1995), which defines the general purpose of the criminal code as "[t]o forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests," and the provisions of Neb. Rev. Stat. §§ 28-1406 to 28-1413 (Reissue 1995) dealing with justification for use of force, the Legislature's definition of second degree murder set forth in § 28-304(1) is not unconstitutionally overbroad. See *State v. Ryan*, *supra* (Gerrard, J., dissenting). Likewise, we are satisfied that in this context the statutes dealing with justification for

> use of force do not impose upon a defendant an unconstitutional shifting of the burden of proof, but, rather, a constitutionally permissible allocation of the burden of production, which when met by anything more than a scintilla of evidence requires the State to prove the lack of justification beyond a reasonable doubt.

255 Neb. at 196-97, 583 N.W.2d at 36. Prior and subsequent to *Burlison*, we have stated that a trial court must instruct the jury on the issue of self-defense when there is "any evidence" adduced which raises a "legally cognizable" claim of self-defense. E.g., *State v. Faust*, 265 Neb. 845, 660 N.W.2d 844 (2003); *State v. Urbano*, 256 Neb. 194, 589 N.W.2d 144 (1999); *State v. Marshall*, 253 Neb. 676, 573 N.W.2d 406 (1998); *State v. Kinser*, 252 Neb. 600, 567 N.W.2d 287 (1997). We apply that standard here.

Self-defense is a statutorily affirmative defense in Nebraska. *State v. Owens*, 257 Neb. 832, 601 N.W.2d 231 (1999). Neb. Rev. Stat. § 28-1409 (Reissue 1995) provides in pertinent part:

> (1) . . . [T]he use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.
>
> . . . .

> (4) The use of deadly force shall not be justifiable under this section unless the actor believes that such force is necessary to protect himself against death, serious bodily harm, kidnapping or sexual intercourse compelled by force or threat, nor is it justifiable if:
>
> . . . .
>
> (b) The actor knows that he can avoid the necessity of using such force with complete safety by retreating or by surrendering possession of a thing to a person asserting a right thereto or by complying with a demand that he abstain from any action which he has no duty to take. . . .

Neb. Rev. Stat. § 28-1406(3) (Reissue 1995) defines "[d]eadly force" as

> force which the actor uses with the purpose of causing or which he knows to create a substantial risk of causing death or serious bodily harm. Purposely firing a firearm in the direction of another person or at a vehicle in which another person is believed to be constitutes deadly force.

To successfully assert the claim of self-defense, one must have a reasonable and good faith belief in the necessity of using force. In addition, the force used in defense must be immediately necessary and must be justified under the circumstances. *State v. Faust*, *supra*; *State v. Urbano*, *supra*.

There is no evidence in the record to support a reasonable and good faith belief that Iromuanya was threatened with death or serious bodily harm at the time he fired the handgun. An instruction that no one was to leave until the shot glasses were retrieved cannot support an inference of such a threat. Several minutes had passed after the initial confrontation with Jenkins, which was broken up after a few seconds with no use of deadly force by anyone. Assuming the truth of Iromuanya's statement to police that when Jenkins approached a second time, he asked if Iromuanya was the person who had punched him previously, we conclude that neither that statement nor any other circumstance reflected in the record would warrant a reasonable or good faith belief in the necessity of using deadly force. There is no evidence that anyone, other than Iromuanya, was in possession of a deadly weapon. If the trial evidence does not support a claim of self-defense, the jury should not be instructed on it. *State v. Faust*, 265 Neb. 845, 660 N.W.2d 844 (2003); *State v. Urbano*, 256 Neb. 194, 589 N.W.2d 144 (1999). Because there was no evidence to support a claim of self-defense in this case, the district court did not err in refusing to give the requested instruction.

5. Sufficiency of Evidence

(a) Standard of Review

When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Aldaco*, 271 Neb. 160, 710 N.W.2d 101 (2006); *State v. Muro*, 269 Neb. 703, 695 N.W.2d 425 (2005).

Appendix A

(b) Resolution

Our standard of review as stated above requires substantial deference to the factual findings made by the jury. As an appellate court, we do not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence, as such matters are for the finder of fact. See *State v. Sanders*, 269 Neb. 895, 697 N.W.2d 657 (2005).

Iromuanya was charged with and convicted of one count of attempted second degree murder, one count of second degree murder, and two counts of using a weapon to commit a felony. A person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation. § 28-304(1). Murder in the second degree is a Class 1B felony. § 28-304(2). A person is guilty of an attempt to commit a crime if he or she intentionally "engages in conduct which, under the circumstances as he or she believes them to be, constitutes a substantial step in a course of conduct intended to culminate in his or her commission of the crime." Neb. Rev. Stat. § 28-201(1)(b) (Cum. Supp. 2004). Criminal attempt is a Class II felony when the crime attempted is a Class I, Class IA, or Class IB felony. § 28-201(4)(a). Any person who uses a firearm to commit any felony which may be prosecuted in a court of this state commits the offense of using a deadly weapon to commit a felony. Neb. Rev. Stat. § 28-1205(1) (Reissue 1995). Use of a deadly weapon which is a firearm to commit a felony is a Class II felony. § 28-1205(2)(b).

As we have noted, it is undisputed that Iromuanya intentionally fired the shot which injured Jenkins and killed

Cooper. Viewed in a light most favorable to the prosecution, the circumstantial evidence is sufficient to establish that he did so with the intent of killing Jenkins. The evidence thus supports the conviction of attempted second degree murder and, under the doctrine of transferred intent, the conviction of second degree murder. See *State v. Morrow*, 237 Neb. 653, 467 N.W.2d 63 (1991) (holding evidence sufficient to support second degree murder conviction where defendant pointed gun at neck of person with whom he had exchanged angry words, fired and missed, but hit and killed another person). Because a firearm was used to commit both of these crimes, the evidence is also sufficient to support the convictions on two counts of use of a weapon to commit a felony.

There is no merit to Iromuanya's argument that the evidence was insufficient to support his convictions.

6. Sentencing Issues

(a) Additional Facts

At the sentencing hearing, Iromuanya objected to various documents included in the presentence investigation report (PSI), which documents he characterized as "character letters" regarding Cooper. The court sustained the objection and stated it would only consider those portions of the PSI that "appropriately should be considered by the Court with respect to victim impact statements." After allocution and immediately prior to pronouncing sentence, the court made the following statement on the record:

> [T]his is a tragic case. It's a tragedy for the family and friends of Jenna Cooper, and for Nolan

Jenkins, his family and his friends. And as in any murder case, whenever someone is murdered, there is a sense of loss for parents, brothers, relatives and friends, and that loss is immense. And when someone is shot and seriously injured, it has a significant emotional impact on the victim, their family, their friends, I recognize that.

I also recognize that this is a tragedy for . . . Iromuanya's family and his friends. And I certainly consider [Iromuanya]'s lack of any real significant criminal history. However, in determining the appropriate sentence, this Court must consider all of the surrounding facts and circumstances of these crimes.

The jury determined that you intentionally tried to kill Nolan Jenkins, and the jury found you guilty of the murder of Jenna Cooper. You brought a gun with you. No one there had a gun that evening. No one had any type of a weapon that evening, except for you. It was your anger that caused you to pull that gun out of your pocket and you shot that gun in anger.

In determining the appropriate sentence, this Court must consider the protection of the public, and I cannot ignore that you shot someone, simply because they pushed you and made you angry. I also must impose a sentence that will not depreciate the seriousness of these crimes.

Appendix A

The sentencing range for attempted murder in the second degree, a Class II felony, is a minimum of 1 year's imprisonment and a maximum of 50 years' imprisonment. Neb. Rev. Stat. § 28-105(1) (Cum. Supp. 2004) and §§ 28-201(4)(a) and 28-304(2). The court sentenced Iromuanya to imprisonment for 25 to 35 years on this conviction, charged in the information as count I. The sentencing range for use of a weapon which is a firearm to commit a felony, a Class II felony, is a minimum of 1 year's imprisonment and a maximum of 50 years' imprisonment. §§ 28-105(1) and 28-1205(2)(b). The court sentenced Iromuanya to imprisonment for a period of 10 to 20 years on the weapons conviction related to the attempted second degree murder conviction, charged in the information as count II. The sentencing range for murder in the second degree, a Class IB felony, is a minimum of 20 years' imprisonment and a maximum of life imprisonment. §§ 28-105(1) and 28-304(2). The court sentenced Iromuanya to "not less than life imprisonment nor more than life imprisonment" on the second degree murder conviction, charged in the information as count III. On the separate weapons conviction relating to the second degree murder conviction, charged as count IV of the information, the court sentenced Iromuanya to imprisonment for a period of 10 to 20 years. The court further ordered that the sentence on count II is to run consecutively to count I, the sentence on count III is to run consecutively to counts I and II, and the sentence on count IV is to run consecutively to counts I, II, and III. Iromuanya was given credit for time served.

Appendix A

(b) Standard of Review

A determination of whether multiple convictions in a single trial lead to multiple punishments depends on whether the Legislature, when designating the criminal statutory scheme, intended that cumulative sentences be applied for conviction on such offenses. *State v. Spurgin*, 261 Neb. 427, 623 N.W.2d 644 (2001).

Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion. *State v. Thomas*, 268 Neb. 570, 685 N.W.2d 69 (2004); *State v. Weaver*, 267 Neb. 826, 677 N.W.2d 502 (2004). An abuse of discretion in imposing a sentence occurs when a sentencing court's reasons or rulings are clearly untenable and unfairly deprive the litigant of a substantial right and a just result. *State v. Sanders*, 269 Neb. 895, 697 N.W.2d 657 (2005).

(c) Resolution

(i) Multiple Punishments for use of Weapon

Iromuanya argues that by imposing separate, consecutive sentences for the convictions of use of a weapon to commit a felony, the district court imposed multiple punishments for the same act in that both counts stemmed from the single shot that he fired. A similar issue was addressed in *State v. Trevino*, 230 Neb. 494, 432 N.W.2d 503 (1988), in which the defendant opened fire on a group of people, causing serious injury to Mark Heil. The defendant was found guilty of attempted second degree murder and the use of a firearm

to commit that felony in connection with the injury to Heil. In a second prosecution, consolidated with the first for trial, the defendant was also convicted of first degree assault upon Heil and use of a firearm in the commission of that felony.

In his appeal from two consolidated cases, the defendant alleged that the two convictions for the use of a firearm against Heil offended the Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution because they amounted to multiple punishments for the same conduct. In rejecting this contention, this court applied the principle that where a legislature specifically authorizes cumulative punishments under two statutes proscribing the same conduct, the prosecution may, in a single trial, seek and the court may impose such cumulative punishments without offending the Double Jeopardy Clause. *State v. Trevino*, *supra*, citing *Missouri v. Hunter*, 459 U.S. 359, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1983). We noted that under the Nebraska statute defining the offense of use of a weapon to commit a felony, the offense was to be "'treated as a separate and distinct offense from the felony being committed'" and that the sentence "'shall be consecutive to any other sentence imposed.'" *State v. Trevino*, 230 Neb. at 521, 432 N.W.2d at 521, quoting § 28-1205(3) (Reissue 1985). We concluded that because the defendant was found guilty of two distinct predicate offenses, attempted second degree murder and first degree assault, the trial court did not err in imposing consecutive sentences on the two corresponding convictions for use of a weapon to commit a felony. A dissent took the position that Nebraska law does not authorize cumulative punishment for attempted murder and assault where both offenses arise from the same conduct, and the dissent

concluded that the assault and corresponding firearm convictions should have been reversed and dismissed.

Nebraska law clearly authorizes cumulative punishments for the attempted second degree murder of Jenkins and the second degree murder of Cooper. Thus, when he fired the handgun, Iromuanya committed two predicate offenses. The language of § 28-1205 is the same today as it was at the time *Trevino* was decided. Because a firearm was used to commit each predicate offense, the district court properly found that there were two separate and distinct offenses of use of a weapon to commit a felony, and the court properly imposed consecutive sentences for each count.

Iromuanya's multiple punishments argument also relies on *State v. Pruett*, 263 Neb. 99, 638 N.W.2d 809 (2002), in which we reiterated our statement in *State v. Ring*, 233 Neb. 720, 447 N.W.2d 908 (1989), that the Legislature's purpose in creating a separate offense of using a weapon in the commission of a felony was to "discourage individuals from carrying deadly weapons while they commit felonies." *State v. Pruett*, 263 Neb. at 105, 638 N.W.2d at 815. In both *Pruett* and *Ring*, we held that an unintentional crime could not serve as the predicate felony for a weapons charge under § 28-1205. In this case, however, intent is an essential element of both of the predicate felonies of which Iromuanya was convicted. Accordingly, we find no merit in the argument that his conviction on the two weapons counts amounted to impermissible multiple punishments.

Appendix A

(ii) Excessive Sentences

The sentences imposed by the district court fell within the statutory sentencing limits for each of the four offenses of which Iromuanya was convicted. Accordingly, we review the sentences for abuse of discretion. *State v. Thomas*, 268 Neb. 570, 685 N.W.2d 69 (2004); *State v. Weaver*, 267 Neb. 826, 677 N.W.2d 502 (2004). Although Iromuanya generally contends that all of his sentences were excessive, his argument focuses exclusively on the maximum sentence he received on the second degree murder conviction. He argues that the trial court placed undue weight on letters and materials received from Cooper's family and friends urging a maximum sentence, while disregarding materials submitted on his behalf arguing for leniency.

As noted, Iromuanya's counsel objected to a "majority of the letters that were sent on behalf of Jenna Cooper and Nolan Jenkins" included in the PSI. The court sustained the objection, stating that it would only consider portions of the PSI that "appropriately should be considered by the Court with respect to victim impact statements." In this regard, we have stated that a judge should take into account facts obtained from victim impact statements in imposing a sentence, as he or she should consider all facts pertinent to sentencing, but a judge must not and cannot allow the judgments and conclusions of the victim's family to be substituted for those of the court in imposing a sentence. See *State v. Carlson*, 225 Neb. 490, 406 N.W.2d 139 (1987). After sustaining the objection, the court asked defense counsel if he was requesting that other materials be removed from the PSI, and defense counsel replied that removal was

not necessary. Thus, it is unclear which portions of the voluminous PSI were actually considered by the sentencing court. However, unlike *Carlson*, we cannot conclude from this record that the court improperly relied on demands for a severe sentence made on behalf of the victims.

Factors a judge should consider in imposing a sentence include the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, and motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime. *State v. Aldaco*, 271 Neb. 160, 710 N.W.2d 101 (2006); *State v. Griffin*, 270 Neb. 578, 705 N.W.2d 51 (2005). In considering a sentence, a court is not limited in its discretion to any mathematically applied set of factors. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing court's observations of the defendant's demeanor and attitude and all of the facts and circumstances surrounding the defendant's life. *Id.*

Iromuanya was 23 years old at the time of his crimes. Although his parents were born in Nigeria, he was born and was raised in Lincoln. He has four siblings. He was never married, but had a steady relationship and three dependent children. He completed high school and attended 1 year of community college. He had been unemployed since July 2003. He reported moderate use of alcohol and a single experimentation with marijuana at the age of 17. He denied use or experimentation with chemical substances other than marijuana. Testing results included in the PSI reflect a "low risk" for violence and aggressiveness, but a "problem risk" for "stress coping."

Appendix A

As specifically noted by the sentencing court, Iromuanya had no significant criminal history. In 1998, he was fined $50 and costs for having no operator's license and a charge of not having proof of insurance was dismissed. In 1999, he was fined $25 for trespassing. In 2001, he was fined $25 for failure to appear and a charge of disturbing the peace was dismissed.

The motivation for his offenses seems apparent from the record. When Ingram announced that no one was to leave until the shot glasses were recovered and Jenkins physically confronted Iromuanya and asked him if he had taken the shot glasses, Iromuanya felt wrongly accused and reacted with anger directed primarily at Jenkins. His anger, perhaps initially justified, explains but does not excuse his subsequent violent act in firing the handgun at Jenkins.

All four of Iromuanya's crimes resulted from the same act. The indeterminate sentences imposed on the attempted murder and weapons counts fall generally near the midpoint of the statutory sentencing ranges, with the minimum term of each sentence set below the maximum term. Based on the relevant sentencing factors outlined above, particularly those articulated by the district court, these sentences do not constitute an abuse of discretion and are not excessive.

The sentence of not less than life imprisonment nor more than life imprisonment imposed for the second degree murder conviction is at the very top of the range permitted by statute and was ordered to run consecutively to the sentences for attempted murder and the related weapons charges. At the sentencing hearing, the court explained that it must consider

the protection of the public and must also impose a sentence that would not depreciate the seriousness of the crimes. Those are, of course, valid general considerations which were applicable to sentencing on all four counts.

We find no abuse of discretion in setting life imprisonment as the maximum term of the second degree murder sentence. Iromuanya arrived at the party carrying a loaded, concealed handgun and used it without justification to extinguish a life. The shooting was a senseless act of violence, and the imposition of the maximum term of life imprisonment properly reflected the seriousness of the criminal conduct and its consequences.

However, the minimum term of Iromuanya's indeterminate sentence, which is the term used to calculate parole eligibility, was also set at life imprisonment. See Neb. Rev. Stat. § 83-1,110 (Cum. Supp. 2004). The court could not have imposed a more severe minimum term for second degree murder on a hardened criminal with a lengthy history of violent felony convictions. A sentence should fit the offender and not merely the crime. *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999), citing *Williams v. New York*, 337 U.S. 241, 69 S. Ct. 1079, 93 L. Ed. 1337 (1949). The record contains no basis upon which we can discern why the minimum term of the sentence for second degree murder was the same as the maximum term, while the minimum terms of the sentences imposed for the other three crimes resulting from the same act were not. Taking into account all of the relevant circumstances, including but not limited to the fact that Iromuanya had no significant criminal record or history of violence, we conclude that the district court abused

its discretion in setting life imprisonment as the minimum term of the sentence for second degree murder and that to that extent, the sentence was excessive. As noted, we find no abuse of discretion in sentencing on the other three counts.

Neb. Rev. Stat. § 29-2308 (Reissue 1995) provides in pertinent part that in criminal appeals brought in this court or the Nebraska Court of Appeals,

> the appellate court may reduce the sentence rendered by the district court against the accused when in its opinion the sentence is excessive, and it shall be the duty of the appellate court to render such sentence against the accused as in its opinion may be warranted by the evidence.

See, also, *State v. Etchison*, 188 Neb. 134, 195 N.W.2d 498 (1972); *State v. Oldenburg*, 10 Neb. App. 104, 628 N.W.2d 278 (2001). Based upon our statutory authority, we reduce Iromuanya's sentence on count III, murder in the second degree, to imprisonment for not less than 50 years nor more than life. We further conclude that this sentence should run concurrently with the sentence of 25 to 35 years' imprisonment on count I, attempted murder in the second degree, which we affirm, inasmuch as both offenses resulted from the same act. We also affirm the sentences of 10 to 20 years' imprisonment each on counts II and IV, use of a weapon to commit a felony, and order that such sentences are to be served consecutively to the sentences on counts I and III, and to each other, as required by § 28-1205(3).

Appendix A

IV. CONCLUSION

For the reasons discussed herein, we affirm Iromuanya's convictions on all four counts. We also affirm the sentences on counts I, II, and IV. We conclude that the sentence imposed by the district court of not less than life imprisonment nor more than life imprisonment on count III, murder in the second degree, is excessive, and we modify that sentence to not less than 50 years' imprisonment nor more than life imprisonment, with the sentence on count III to be served concurrently with the sentence on count I. The sentences of 10 to 20 years' imprisonment on counts II and IV shall be served consecutively to the sentences on counts I and III, and to each other. Iromuanya shall receive credit for 305 days served, as ordered by the district court.

Affirmed as modified.

Wright, J., not participating.

Connolly, J., concurring.

I join the majority opinion. I am, however, prompted to comment regarding how the trial court handled the issue of the spectators' wearing "memorial buttons." It is correct that we have a scanty record as to whether the "memorial buttons" affected the jury. However, this problem could have been easily averted. In this emotionally charged trial, the trial judge, at the first whiff of a problem, should have immediately smothered any incident that could have potentially prejudiced a jury.

Appendix A

It is the duty of a trial court to see that defendants in criminal cases are tried by a jury such that not even the suspicion of bias or prejudice can attach to any member thereof. *State v. Polinski*, 230 Neb. 43, 429 N.W.2d 725 (1988). "[C]ertain practices pose such a threat to the 'fairness of the factfinding process' that they must be subjected to 'close judicial scrutiny.'" *Holbrook v. Flynn*, 475 U.S. 560, 568, 106 S. Ct. 1340, 89 L. Ed. 2d 525 (1986).

Here, defense counsel informed the court on the second day of voir dire of a potential problem and moved in limine to exclude the buttons. Defense counsel stated at that time that "some of the family [are] starting to wear buttons with Jenna Cooper's face or photo. . . ." In response to the court's question, defendant's counsel also stated that he had seen at least one woman wearing buttons that morning. According to defense counsel's affidavit, submitted in support of Iromuanya's motion for new trial, the buttons included some type of slogan. The court's request of defense counsel for case law on the issue was wholly inadequate to address any potential prejudice. After being informed by counsel that family members were starting to wear the buttons, the court had a duty to immediately determine—out of the presence of the jury—who, if anyone, was wearing the buttons, and the message, if any, the buttons conveyed. Had the court appropriately reacted to the first indication of a potential problem, we would either not be dealing with this issue on appeal or have a sufficient record for review. Instead, after 2 days of trial, according to defense counsel's affidavit, the court requested that spectators not wear the memorial buttons. In many cases, this will be too little, too late—the infection will have already spread.

Appendix A

Hendry, C.J., concurring in part, and in part dissenting.

I respectfully dissent from that portion of the opinion which modifies the sentence on count III, murder in the second degree, for which the district court sentenced Iromuanya to "not less than life imprisonment nor more than life imprisonment."

In considering a sentence, the sentencing court is not limited in its discretion to any mathematically applied set of factors. *State v. Weaver*, 267 Neb. 826, 677 N.W.2d 502 (2004). The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observations of the defendant's demeanor and attitude and all of the facts and circumstances surrounding the defendant's life. *State v. Worm*, 268 Neb. 74, 680 N.W.2d 151 (2004).

It is true that the district court found that Iromuanya had no significant criminal history, but, as the majority notes, Iromuanya brought a loaded, concealed handgun to the party. The gun was intentionally used in a senseless act of violence, resulting in the shooting of Nolan Jenkins in the head and Jenna Cooper's death. Regardless of whether this court would have imposed a sentence of life imprisonment for the minimum term of an indeterminate sentence under the same or similar circumstances, I cannot conclude that the sentencing court's reasons for the sentence, inter alia, protection of the public and imposition of a sentence that does not depreciate the seriousness of the crime, are clearly untenable and deprive Iromuanya of a substantial right and just result. See *State v. Sanders*, 269 Neb. 895, 697 N.W.2d 657 (2005). I would find no abuse of discretion and affirm Iromuanya's original sentence on count III.

In all other respects, I concur with the majority opinion.

Gerrard, J., joins in this concurrence and dissent.

Miller-Lerman, J., concurring in part, and in part dissenting.

I respectfully dissent from that portion of the opinion which modifies the sentence on count III, murder in the second degree. Whether or not I would have imposed the same sentence, under the facts and our jurisprudence, I do not find an abuse of discretion.

In all other respects, I concur with the majority opinion.

APPENDIX B — ORDER OF THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA DATED SEPTEMBER 6, 2006

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

CASE NO. CR 04-339

STATE OF NEBRASKA,

Plaintiff,

v.

LUCKY IKENNA IROMUANYA,

Defendant.

ORDER

Judgment is entered pursuant to the mandate of the Nebraska Supreme Court affirming as modified the decision of the District Court, as follows:

"For the reasons discussed herein, we affirm Iromuanya's conviction on all four counts. We also affirm the sentences on counts I, II, and IV. We conclude that the sentence imposed by the district court of not less than life imprisonment nor more than life imprisonment on county III, murder in the second degree, is excessive, and we modify that sentence to not less than 50 years' imprisonment nor more than life imprisonment, with the sentence on count III to be served concurrently with the sentence on count I. The sentences of 10 to 20 years' imprisonment on counts II and IV shall be

served consecutively to the sentences on counts I and III, and to each other. Iromuanya shall receive credit for 305 days served, as ordered by the district court."

Costs of this appeal are to be paid by Lancaster County and are taxes at $66.50.

SO ORDERED.

DATED this 6th day of September, 2006.

BY THE COURT:

s/ John A. Colborn
John A. Colborn
District Court Judge

APPENDIX C — OPINION OF THE NEBRASKA SUPREME COURT DATED AUGUST 25, 2006

Date: August 25, 2006

NEBRASKA SUPREME COURT

To: Lancaster County District Court, Nebraska

WHEREAS, in a late action in your court, captioned:

State v. Lucky Ikenna Iromuanya

you rendered judgment.

And, WHEREAS, defendant Lucky Ikenna Iromuanya prosecuted an appeal to this court.

ON CONSIDERATION WHEREOF, the judgment which you rendered has been affirmed as modified by the Supreme Court.

NOW, THEREFORE, you shall, without delay, proceed to enter judgment in conformity with the judgment and opinion of this court.

Costs of this appeal are to be paid by Lancaster County and are taxed at $66.50.

WITNESS the Honorable John V. Hendry, Chief Justice, and the seal of this court.

s/ Lanet S. Asmussen
Clerk of the Supreme Court

s/ Ian Culver
Deputy Clerk

Appendix C

Supreme Court No.
S-05-000367

Trial Tribunal No.
CR04-339

Date Opinion Issued
08/11/06

COSTS IN THE SUPREME COURT

Cost Due Clerk Supreme Court	$	50.00
Paid by District Court Clerk	$	-0
Automation Fee Due	$	6.00
Uniform Data Analysis Fee Due	$	1.00
Dispute Resolution Fee Due	$	.75
NSC Education Fee Due	$	1.00
Indigent Defense Fee Due	$	2.75
Legal Services Fee Due	$	5.00
Total Cost	$	66.50

APPENDIX D — ORDER OF THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA DATED FEBRUARY 24, 2005

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

CASE NO. CR 04-339

STATE OF NEBRASKA,

Plaintiff,

v.

LUCKY I. IROMUANYA,

Defendant.

ORDER

THIS MATTER came on for hearing on February 24, 2005, on the Defendant's Motion for New Trial. The defendant was present with his attorneys, Corey Reiman and John Berry. The State was represented by Deputy County Attorneys Jeff Matters and Steve Schmidt. The affidavit of Attorney Reiman was offered and received over objection. The motion was argued and submitted.

The defendant argues that a new trial should be granted because unduly prejudicial evidence was introduced during the trial primarily during the testimony of Ellen Cooper and Nolan Jenkins. The court notes that the defendant filed a motion in limine asking the court to prohibit Ellen Cooper from testifying. The motion was overruled. In order to preserve objections made in a motion in limine, it is necessary

to object to the evidence at the time it is offered at trial. A review of the record reflects that most of the testimony of Ellen Cooper was received without objection. Many of the objections made during her testimony were sustained. This court attempted to limit her testimony to areas relevant to the issues in the trial. The court notes that Ellen Cooper was one of the first witnesses called during the trial. She testified that Jenna Cooper had been collecting shot glasses for some time, similar to her aunt's Kentucky Derby glass collection. The evidence at trial revealed that shot glasses had been stolen from Jenna Cooper's house. There was a strong reaction from Jenna Cooper and her roommate Lindsay Ingram when it was discovered that the shot glasses had been stolen. This testimony put perspective on the reaction of the victims as these weren't just glasses that had been stolen, they were glasses that were part of a collection that had strong sentimental value to Jenna Cooper. The testimony about Jenna Cooper being a soccer player and an engineering major simply put in perspective the reason for the party at her house and explained who was there and why. It was the end of the Spring season and just before finals. The court notes that there was no objection to the testimony about the shot glass collection. There was no objection to Ellen Cooper testifying that she had been to Lincoln to watch Jenna Cooper play soccer and had left on April 24 to return to Louisville. There were no objections to numerous other questions asked of Ellen Cooper concerning returning to Lincoln after she had been informed that Jenna Cooper had been shot. The defendant did object to Ellen Cooper identifying her daughter in a photograph. The court notes that this photograph had already been received into evidence during the testimony of the treating physician. There was no testimony that the

treating physician knew Jenna Cooper prior to her being brought to the hospital. The Nebraska Supreme Court in *State v Clark*, 255 Neb. 1006 (1999), held that a family photograph of a victim can not be received unless it is offered for a proper purpose. The court stated that a photograph of the victim "may be received for the purposes of identification, to show the condition of the body or the nature and extent of wounds and injuries to it, and to establish malice or intent." Id. at 1012. The court notes that this was a photograph of Jenna Cooper at the hospital which had already been received into evidence, and was not a family photograph or a "Senior" picture. The State bears the burden of proving beyond a reasonable doubt each and every element of the crime charged, including proving the identity of the victim. (It is customary to have someone who knows the victim to identify the body.) As noted, Ellen Cooper was one of the first witnesses to be called after the doctor testified. If no one who knew Jenna Cooper identified the photograph, could an argument be made that the State had failed to identify the victim since the doctor did not know whether the person he treated was Jenna Cooper or some other gunshot victim? Arguably, circumstantial evidence could have been introduced to prove identity or some other witness could have later identified Jenna Cooper. If it was unnecessary to allow Ellen Cooper to identify her daughter as the person in the photograph, it is the conclusion of the court that this was not so prejudicial as to have denied the defendant his right to a fair trial, and does not require this court to grant him a new trial. The court notes that on numerous occasions the court reminded the jury that they must not let emotion, sympathy, or prejudice play a role in their deliberations.

Appendix D

The defendant also complains about the testimony of Nolan Jenkins concerning his visiting Jenna Cooper at the hospital and not knowing that she was dead because of his brain injury. The record reflects that this testimony was given on page 29 of his testimony. Numerous questions were asked and answers given after that testimony, and it was not until the 34th page of his testimony that defense counsel made his objection to this testimony. The court concluded that the objection was not timely made. It is difficult to take all emotion out of a murder trial. The court notes that throughout the trial, defense counsel mentioned the loss to Jenna Cooper's family and friends. At the end of Ellen Cooper's testimony, defense counsel stated: "Ms. Cooper, I'm sorry for your loss. And I don't have any questions. Thank you." Defense counsel repeatedly reminded the jury that their decision should not be based on sympathy or prejudice. And this court repeatedly reminded the jury of this in the court's comments during jury selection and the court's instructions to the jury.

The defendant also argues that the prosecution improperly offered evidence concerning the bad character of the defendant. The court finds these arguments are without merit.

The defendant also argues that he was prejudiced by the fact that family and friends of Jenna Cooper wore buttons with pictures of Jenna Cooper in the courthouse. There is no evidence before the court that any juror ever saw any of these "buttons" or that any juror was influenced in any way by any button. The court concludes that this issue is without merit.

Appendix D

The defendant argues that the jury instructions were erroneous. The court concludes that this argument is without merit.

The defendant complains that the verdicts of the jury are not sustained by the evidence. The court concludes that this argument is without merit.

It is the determination of the court that the Motion for New Trial should be overruled and denied.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Defendant's Motion for New Trial is overruled and denied.

DATED this 24th day of February, 2005.

BY THE COURT:

s/ John A. Colborn
John A. Colborn
District Court Judge

APPENDIX E — ORDER OF SENTENCE OF THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA DATED FEBRUARY 24, 2005

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

CASE NO. CR 04-339

STATE OF NEBRASKA,

Plaintiff,

v.

LUCKY I. IROMUANYA,

Defendant.

ORDER OF SENTENCE

This matter came before the court for sentencing. The State was represented by Deputy County Attorneys, Jeff Mathers and Steven Schmidt, The defendant appeared in custody with Attorneys Korey Reiman and John Berry. Neither the defendant nor his counsel having given any reason why sentence should not be pronounced, the court sentences the defendant as follows:

Having regard for the nature and circumstances of the crimes and the history, character and condition of the defendant, the court finds that imprisonment of the defendant is necessary for the protection of the public because the risk is substantial that, during any period of probation, the defendant would engage in additional criminal conduct and because a lesser sentence would depreciate the seriousness of the defendant's crimes and promote disrespect for the law.

Appendix E

IT IS THEREFORE, THE JUDGMENT AND SENTENCE OF THE COURT, that the defendant, **LUCKY I. IROMUANYA**, be, and hereby is, ordered committed to an institution under the jurisdiction of the Nebraska Department of Correctional Services, on **Count I**, for a period of not less than 25 years nor more than 35 years, no part of which shall be in solitary confinement, except for violation of prison rules; on **Count II**, for a period of not less than 10 years nor more than 20 years, no part of which shall be in solitary confinement, except for violation of prison rules; on **Count III**, for a period of not less than life imprisonment nor more than life imprisonment, no part of which shall be in solitary confinement, except for violation of prison rules; and on **Count IV**, for a period of not less than 10 years nor more than 20 years, no part of which shall be in solitary confinement, except for violation of prison rules. The sentence on Count II is to run consecutive to Count I. The sentence on Count III is to run consecutive to Counts I and II. The sentence on Count IV is to run consecutive to Counts, I, II and III. The defendant shall pay the costs of this prosecution.

The defendant should be, and hereby is, remanded to the custody of the Nebraska Department of Correctional Services for the consecutive execution of these sentences and a commitment is to issue accordingly. The defendant is to be given credit for 305 days served.

A copy of this order is sent to counsel of record.

DATED this 24th day of February, 2005.

Appendix E

SO ORDERED.

BY THE COURT:

s/ John A. Colborn
John A. Colborn
District Court Judge

No. 06-686

FILED
DEC 14 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

LUCKY I. IROMUANYA,

Petitioner,

vs.

STATE OF NEBRASKA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Nebraska

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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OPINION BELOW

State v. Iromuanya, 272 Neb. 178, 719 N.W.2d 263 (2006).

There is a relevant unpublished trial court order explaining the trial court's reasons for the reception in evidence of the testimony of Ellen Cooper, the mother of the victim Jenna Cooper. The trial court's order is found at Appendix D of the Petition for a Writ of Certiorari ("Petition"). (App. 61a-63a) The trial court's order provided a rationale that was based on state evidence and state procedural rules in the absence of any constitutional objections by Iromuanya to the reception of the testimony. The Nebraska Supreme Court's opinion discusses the Nebraska Supreme Court's review of the trial court's order.

STATEMENT OF THE CASE

I. The crimes

The petitioner Lucky I. Iromuanya ("Iromuanya") was convicted of four crimes after a jury trial. Iromuanya was convicted of second degree murder for killing the victim Jenna Cooper, attempted second degree murder for shooting the victim Nolan Jenkins, and two counts of use of a weapon for using a gun to commit a felony in connection with the murder of Cooper and attempted murder of Jenkins.

II. The facts

The facts summarized in the Nebraska Supreme Court's opinion accurately summarize the trial record. Iromuanya's Petition does not accurately summarize the

trial record. Iromuanya's Petition presents an inaccurate summary of the trial to promote baseless claims of prejudice and denial of a fair trial.

Iromuanya's Petition contains numerous citations to newspaper articles, rather than the trial record, as supporting authority. The jury's verdict was based on the evidence received during the trial as reflected by the trial record. The jury's verdict was not based on newspaper articles or other irrelevant matters outside the record.

Iromuanya's Petition also contains misstatements of fact when purporting to cite to the trial record. For example, Iromuanya's Petition, at page 3, described the victim Jenkins as a "large, drunken, white male." Iromuanya's Petition, at footnote 5, provides a trial record citation where Jenkins purportedly testified to consuming a case of beer. The trial record actually reflects that Jenkins actually testified to drinking half the quantity of beer stated in Iromuanya's Petition, that Jenkins wasn't intoxicated, and that Jenkins believed himself to be within the legal limit to drive a car. (Trial BOE2109:12-2110:2) As far as the size of Jenkins, he was 5' 11½" tall and weighed 180 pounds. (2117:6-9) Iromuanya was approximately the same size. (1549:6-9; 1519:19-20) Iromuanya had a gun. Jenkins did not.

Iromuanya's Petition, at page 4, cites a newspaper article, rather than the trial record, to support his claim that he felt threatened by Jenkins. The evidentiary portion of the trial record consists of approximately 1,700 pages. Iromuanya's claim of fear is refuted both by the Nebraska Supreme Court affirming the trial court's denial of a self-defense jury instruction and by Iromuanya's own videotaped statement and separate written statement to

the police that were received in evidence. (Trial exhibits 126, 127 and 137) The Nebraska Supreme Court stated, "There is no evidence in the record to support a reasonable and good faith belief that Iromuanya was threatened with death or serious bodily harm at the time he fired the handgun." Iromuanya shot Jenkins after Jenkins had his hand out to apologize to Iromuanya. Iromuanya's written statement to the police acknowledged, before shooting Jenkins, that he had been told, "don't worry he [Jenkins] just wants to apologize." (Trial exhibit 137)

Iromuanya's Petition makes newspaper citation references, not trial record citations, to support claims of activities by white supremacist groups. Iromuanya made no claims of error on appeal related to any such groups or activities or any effect on the jury that convicted Iromuanya.

Trial witness Carrington Hartley was an invited guest at the party where the shooting occurred. Hartley was also a black male from Jamaica. After Harley observed an initial scuffle between Iromuanya and Jenkins, Hartley testified that his initial thought was that Iromuanya might, as a minority person, be feeling threatened. Hartley's perception was that since Hartley was also a minority person, Hartley could convince Iromuanya, "[T]hat I know these people and I am a minority as well, and I am speaking to him and comfort him, I wanted him to know that nobody would be messing with him, that he would be fine and he would calm down." (1476:22-1477:6)

Hartley's perception that he, as a fellow minority, could help calm Iromuanya was soon eliminated by reality. (1569:1-7) Hartley testified as follows:

> Q ... – I guess you told us first about your thought process after you broke up this initial scuffle. The defendant didn't know people there?
>
> A Yes.
>
> Q He was one of the few minorities?
>
> A Yes.
>
> Q Had it entered your mind that maybe you could – if he was afraid that you could help?
>
> A Yes.
>
> Q Did it appear to you, after you came up to the defendant and closer, that he was afraid and scared?
>
> A Not at all.
>
> Q How did it appear to you?
>
> A He's obvious – He's riled up. I mean I would parallel his behavior to a fighting cock. He was all riled up, he was ready to go basically.

(1568:24-1569:14)

The references in Iromuanya's Petition purporting to describe trial spectators wearing memorial buttons is also not supported by the trial record. The Nebraska Supreme Court's opinion contains a discussion of Iromuanya's assignment of error on this issue after prefacing its discussion by stating in relevant part, "the record in this case gives us little information on which to evaluate Iromuanya's assigned error."

The trial record reflects that the testimony of Ellen Cooper, the mother of the victim Jenna Cooper, was limited in detail and in length. The total testimony of

Ellen Cooper encompasses less than 15 pages of the approximate 1,700 pages of trial record testimony. (486:5-501:25)

Ellen Cooper testified, without objection, that she last spoke with Jenna on the phone at approximately 8:30 p.m. on the night of the shooting. (495:15-20) Ellen Cooper testified, again without objection, that early the next morning she received a phone call informing her of the shooting. (496:1-497:4) She testified, without objection, that upon arriving at the hospital, she received a briefing on Jenna's condition before being taken back to Jenna. (497:10-498:10; 499:4-15)

Ellen Cooper concluded her testimony by being asked to identify Jenna from a photo taken of Jenna in the hospital. Iromuanya's counsel objected to the question only on the grounds of Nebraska Evidence Rule 403, not on any constitutional grounds. (501:17-22) After the trial court overruled the objection, Ellen Cooper cried and stated, "That's my baby girl Jenna." (501:17-25; E19) The question requesting Ellen Cooper to identify Jenna by the photo, Iromuanya's state evidence rule objection, and Ellen Cooper's verbal answer and emotional response of crying when answering are the primary portion of the trial record related to the "Question Presented" by Iromuanya's Petition.

The photo by which Ellen Cooper identified her daughter was one of the photographs referred to by Dr. Burton, the prior witness, when describing his treatment of Jenna at the hospital after the shooting. (E19; 440:6-22) No further questions were asked of Ellen Cooper after she identified Jenna. Iromuanya did not move for a mistrial.

REASONS FOR DENYING THE WRIT

I. Rule 10 considerations

A. The Nebraska Supreme Court did not decide a federal question.

The Nebraska Supreme Court's opinion did not decide an important federal question. The Nebraska Supreme Court disposed of Iromuanya's claim concerning Ellen Cooper's photo identification of her deceased daughter on purely state law grounds. This is because Iromuanya raised no federal constitutional question in his state court appeal.

Iromuanya made no constitutional objection to Ellen Cooper's trial testimony or to her reaction upon identifying her daughter by photo at the conclusion of her testimony. Iromuanya's only objection to the testimony was Nebraska Evidence Rule 403, which objection was overruled by the trial court. Iromuanya's claim of error and supporting argument on appeal were based on state law. On appeal, Iromuanya argued for the Nebraska Supreme Court to adopt a bright-line state evidence rule prohibiting a family member of the deceased from identifying a homicide victim unless there are independent reasons to permit such testimony. Iromuanya's other argument on appeal was that the trial court had erred by overruling his Nebraska Evidence Rule 403 objection.

The Nebraska Supreme Court's opinion rejected Iromuanya's arguments by (1) declining to adopt a bright-line rule against family member identification of a homicide victim, and (2) concluding that the trial court did not abuse its discretion in receiving Ellen Cooper's identification testimony in accordance with state evidence rules. Although not raised by Iromuanya's Question Presented in his Petition, the Nebraska Supreme Court did find that

the trial court erred by receiving other testimony by Ellen Cooper concerning her daughter's hobbies, interests, and aspirations. The Nebraska Supreme Court concluded that this latter evidentiary error was harmless.

B. The Nebraska Supreme Court did not create a conflict involving an important federal question.

Because no federal constitutional question was reached by the Nebraska Supreme Court in resolving Iromuanya's claim concerning family member identification of the victim and because the only law applied in doing so was Nebraska evidence and procedural law, Nebraska Supreme Court's decision cannot create a conflict with the decisions of this Court, the highest court of another state, or a federal court of appeals on a matter of federal constitutional law.

C. No compelling reasons.

The Petition does not involve a significant question of federal law or the federal constitution. Iromuanya's Petition appears to advocate the adoption of a bright-line constitutional evidence rule to exclude the criminal trial testimony of a class of otherwise competent witnesses because of concerns that members of the class might not always testify in a unemotional, detached manner. There are no compelling reasons to grant the Petition.

II. Rule 14(1)(g)(i) considerations

As summarized in the previous section concerning Rule 10 considerations, the record of the trial, state court

appeal, and Nebraska Supreme Court opinion do not reflect that the federal question sought to be reviewed was raised in either the trial court or in the appeal to the Nebraska Supreme Court. Page 10 of Iromuanya's Petition states that Iromuanya "invoked Nebraska Evidence Rule 403."

Iromuanya's arguments and a review of the cases cited in his Petition reflect that state courts, when presented with state court evidence issues, have reached various conclusions for various reasons on matters of state law. The trial record is devoid of any evidence to support the conclusion that the jury's verdict was affected or influenced, at all, by any of the "additional circumstances" alluded to at page 13 of Iromuanya's Petition. The trial record also does not support the existence of the claimed "additional circumstances."

CONCLUSION

For the above reasons, the respondent opposes the petition for a writ of certiorari.

Respectfully submitted,

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FILED
DEC 27 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(3)

No. 06-686

IN THE
Supreme Court of the United States

LUCKY I. IROMUANYA,

Petitioner,

v.

STATE OF NEBRASKA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Nebraska

PETITIONER'S REPLY BRIEF

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REPLY TO RESPONDENT'S STATEMENT OF THE CASE

The Respondent has taken issue with two assertions made by the Petitioner: that Petitioner felt threatened at the time the gun went off and that Jenkins, who first attacked the Petitioner and who pushed and beat the Petitioner, was intoxicated.

Petitioner's belief that he was about to be physically assaulted at the time the gun went off is supported by the following testimony from the Record: first, testimony from a number of witnesses that moments earlier the Petitioner had been repeatedly assaulted by Nolan Jenkins and Adam Ellingson;[1] and second, statements by the Petitioner that at the time the gun went off, Petitioner believed -- based on what Jenkins said to Petitioner[2] and the way in which Jenkins approached Petitioner[3] -- that Jenkins and others were returning to assault him again.[4]

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[1] Trial testimony of Brooke Bredenberg (Trial Tr. Vol. IX, 1419-20); Trial testimony of Adam Ellingson (Trial Tr. Vol. XIII, 2015-24); Trial testimony of Allison Scace (Trial Tr. Vol. IX, 1364-66); Trial testimony of Aroun Phaisan (Trial Tr. Vol. XI, 1701-03).

[2] When Jenkins approached Petitioner for the second time, Jenkins said, according to the Petitioner, "'you hit me, didn't you?'" At this point, Petitioner "figured that he was going to try to sw-, try to fight me again." (Iromuanya Videotaped Statement Tr. at 12).

[3] Jenkins came within four inches of Iromuanya's face. (Trial testimony of Carrington Hartley, Trial Tr. Vol. X, 1559).

[4] After the initial confrontation, Jenkins "stepped forward like he was going to hit Lucky." Trial testimony of Nathaniel Buss (Trial Tr. Vol. IV, 684). Carrington Hartley's "initial thought was that Iromuanya might, as a minority person, be feeling threatened." Br. in Opp'n at 3.

Respondent suggests that Petitioner did not feel threatened because he was roughly the same height as Jenkins: The facts are that Jenkins was a state wrestling champion and weightlifter[5] and that Petitioner was surrounded by ten to fifteen of Jenkins' friends.[6]

Respondent claims that Jenkins "wasn't intoxicated, and that Jenkins believed himself to be within the legal limit to drive a car." Br. in Opp'n at 2. The fact is that Jenkins conceded that he was intoxicated and incapable of driving.[7] In addition, Jenkins' own testimony is that he had consumed

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[5] Jenkins, who was also a furniture mover, was capable of bench pressing 340 lbs. Trial testimony of Nolan Jenkins (Trial Tr. Vol. XIII, 2116-17); Trial Testimony of Adam Ellingson (Trial Tr. Vol. XII, 1954).

[6] According to Lindsey Ingram, Jenkins' girlfriend, there were "10 to 15 people in the yard" "surrounding Lucky and Nolan." Trial testimony of Lindsey Ingram (Trial Tr. Vol. V, 797).

[7]
Q. You had a case of Busch Light with you?

A. Yes

Q. That night you had, roughly, 12 beers?

A. Correct

Q. Do you believe you were borderline intoxicated?

A. I had drank 12 beers, so I was in a not driving shape, but I wasn't intoxicated where anybody would worry about me being alcohol intoxicated or making – I wouldn't drive a vehicle, but I don't drink and drive in the first place. So within the legal limits of Nebraska state law, which I believe is point eight, I'm sure I would have blown more than that point eight.

Q. I think you probably mean .08, right?

A. Yes

Trial testimony of Nolan Jenkins (Trial Tr. Vol. XIII, 2109-10)

twelve beers.[8] For a man of Jenkins' size, this would have resulted in a blood alcohol concentration nearly double the legal limit to drive.[9]

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[8] Trial testimony of Nolan Jenkins (Trial Tr. Vol. XIII, 2109-10) (as cited in Petitioner's brief at page 3, footnote 5).

[9] The Drink Wheel, *available at* http://www.intox.com/wheel/drinkwheel.asp.

REASONS FOR GRANTING THE WRIT

In his principal brief, Petitioner argued that a writ of certiorari is necessary to resolve a division among state supreme courts over the issue of whether unnecessary and highly emotional testimony as to the identity of a victim by a member of the victim's family constitutes a denial of a defendant's constitutional right to a fair trial. In reply, the Respondent asserts that the Petitioner did not raise and the Nebraska Supreme Court did not address a constitutional issue. Both assertions are obviously and demonstrably false.

A. Petitioner Raised A Constitutional Objection – Based On The Denial Of The Right To A Fair Trial – To The Admission Of The Testimony Of The Victim's Mother.

The right to a fair trial is a well-established constitutional right that includes both the guarantee of due process under the Fifth and Fourteenth Amendments and the right to an impartial jury under the Sixth Amendment.[10] Petitioner's counsel expressly objected to Mrs. Cooper's testimony on the grounds that the testimony of the victim's mother denied the

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[10] *See U.S. v. Gonzalez-Lopez,* 126 S.Ct. 2557, 2562 (2006) ("The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment.") (citation and quotations omitted); *Bracy v. Gramley,* 520 U.S. 899, 904 (1997) ("the Due Process Clause of the Fourteenth Amendment establishes a constitutional floor...[that] requires a fair trial in a fair tribunal") (citations and quotations omitted); *Morgan v. Illinois,* 504 U.S. 719, 727 (1992) ("the jury must stand impartial and indifferent to the extent commanded by the Sixth Amendment") (citations omitted); *see also The Juror's Need to Know vs. The Constitutional Right to a Fair Trial,* 97 Dick. L. Rev. 627, 654 n.1 (1993). The Supreme Court of Nebraska has held that the due process clauses under the Nebraska Constitution and the U.S. Constitution are co-extensive. *State v. Thomas,* 685 N.W.2d 69, 78 (Neb. 2004).

Petitioner his constitutional right to a "fair trial": specifically, in Petitioner's motion for New Trial, Petitioner objected to Mrs. Cooper's testimony on the ground that it "prevented Defendant from receiving a *fair trial.*"[11] This was preceded by defense counsel's repeated challenges based upon the impact of Mrs. Cooper's testimony on the jury.[12]

Petitioner's objection, in turn, was expressly recognized and addressed as a constitutional fair trial challenge by the trial court, which stated: "[I]t is the conclusion of the court that [Mrs. Cooper's identification testimony] was not so prejudicial as to have denied the defendant his *right to a fair trial.*" *State v. Iromuanya*, 719 N.W.2d 263, 281 (Neb. 2006) (emphasis added).

On appeal, Petitioner reiterated his constitutional objection,[13] and the Nebraska Supreme Court quoted the trial court's opinion (as excerpted immediately above), making it clear that the Supreme Court recognized Petitioner's argument and the decision of the trial court to be based on a constitutional fair trial objection. *State v. Iromuanya*, 719 N.W.2d 263, 281 (Neb. 2006). Indeed, in summarizing Petitioner's argument, Respondent itself describes Petitioner's Rule 403 objection as a "denial of fair trial" argument. Br. in Opp'n at 2.

Respondent's Opposition also mischaracterizes the scope of Petitioner's constitutional objection to Mrs. Cooper's testimony. Petitioner's fair trial objection included, in

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[11] Motion for New Trial, *State of Nebraska v. Iromuanya*, No. S-05-000367 (Dec. 30, 2004) at ¶ 2 (emphasis added).

[12] Trial Tr. Vol. I, 155-56; Motion to Exclude Witness, *State of Nebraska v. Iromuanya*, No. S-05-000367, at ¶ 2.

[13] Appellant's Br. at 35, *State of Nebraska v. Iromuanya*, No. S-05-000367 (Sept. 9, 2005)

addition to a due process objection under the Fourteenth Amendment, a challenge based on the right to an impartial jury under the Sixth Amendment. *See* Br. of Amicus Curiae at 5-6. For example, on appeal, Petitioner argued that Mrs. Cooper's testimony denied Petitioner a right to a fair trial because the circumstances surrounding the trial made it impossible that a jury hearing her emotional testimony could remain impartial. *See* Br. of Appellant at 35, *State v. Iromuanya*, No. S-05-000367 (Sept. 9, 2005).

B. The Decision Of The Nebraska Supreme Court Was Based Exclusively Upon The Due Process Clause Of The Fourteenth Amendment.

The Nebraska Supreme Court began its analysis of the admissibility of the mother's testimony by quoting the trial court's conclusion that the testimony of the victim's mother was "'not so prejudicial as to have denied the defendant his right to a fair trial.'" *Iromuanya*, 719 N.W.2d at 281. It was in reviewing this very conclusion by the trial court that the Nebraska Supreme Court applied the test that it and every other state and federal court applies when confronted with a due process or fair trial challenge to the admissibility of evidence -- that is, the balancing test set forth in Federal Rule of Evidence 403 or its state equivalent.

It is well established that Federal Rule of Evidence 403 and its state equivalents provide the exclusive mechanism by which federal and state courts address due process challenges arising from the admission of evidence.[14] Nebraska is no

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[14] *See* Pet. Br. at 9 n.19 (listing cases). The only debate on this issue is not whether Rule 403 is the means by which due process concerns are evaluated but whether the Rule sufficiently protects these concerns. In fact a number of commentators have argued that a defendant's due process rights require even stronger protection than that provided by Rule 403. *See generally* D. Craig Lewis, *Proof and Prejudice: A Constitutional Challenge to the Treatment of Prejudicial Evidence in*

exception, and Respondent does not a single case in which the Nebraska Supreme Court, when faced with a "due process" or "fair trial" challenge to the admission of evidence, applied any test other than Rule 403.

For example, in *State v. Simants*, in reviewing a case in which the defendant argued that the admission of certain testimony violated his "right to due process," the Nebraska Supreme Court held that the testimony "should have been excluded in light of Neb. Evid. R. 403." 537 N.W.2d 346, 351 (Neb. 1995). Similarly, in *State v. Timmerman*, 480 N.W.2d 411 (Neb. 1992), the defendant raised a fair trial objection by arguing that the admission of certain conversations into evidence had denied him "due process of law in accordance with the due process clause." *Id.* at 416. In response, the Nebraska Supreme Court applied the three part test for admissibility set forth in this Court's decision in *Huddleston v. United States*, 485 U.S. 681 (1988), the third part of which requires the trial court to make an assessment "'under Rule 403 to determine whether the probative value of the [challenged] evidence is substantially outweighed by prejudice.'" *Timmerman*, 480 N.W.2d at 419 (quoting *Huddleston*, 485 U.S. at 692). Further, in *State v. Kunert*, No. A-94-1098, 1995 Neb. App. LEXIS 195 (Neb. App. Ct. June 20, 1995), the Nebraska Court of Appeals applied Nebraska Evidence Rule 403 to determine whether the defendant was deprived of "his substantial right to a fair

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Federal Criminal Cases, 64 Wash. L. Rev. 289 (1989) (arguing that a rule excluding prejudicial evidence is constitutionally required, but that Rule 403 permits the admission of too much prejudicial evidence and thereby impairs the reliability of criminal convictions). *See also* Richard D. Friedman, *A Close Look at Probative Value*, 66 B.U. L. Rev. 733, 735 n.8 (1986); Victor J. Gold, *Limiting Judicial Discretion to Exclude Prejudicial Evidence*, [illegible] J.C. Davis L. Rev, 59, 73 (1984).

trial" by the trial court's decision to exclude certain evidence. *Id.* at *19.[15]

As the above authority demonstrates, Nebraska courts follow federal and state precedent by evaluating constitutional due process and fair trial challenges through the application of the Rule 403 balancing test. Respondent cites no cases to the contrary. Accordingly, Respondent's sole argument in opposing the petition -- that Petitioner only raised, and the Supreme Court only addressed, a state law objection -- is without merit.[16]

As a final matter, Respondent objects to Petitioner's citation to facts from newspaper articles on the basis that such articles are not part of the record. While these articles are not part of the Record below, the circumstances they recount are a matter of public record, and Petitioner and *Amicus* contend that those circumstances should have been taken into account in determining whether the mother's testimony was both unduly prejudicial under the balancing test and whether Petitioner was denied his right to an impartial jury.

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[15] Not only does the Nebraska Supreme Court apply the Rule 403 balancing test in the specific context of due process and fair trial challenges to the admission of evidence, but the Supreme Court of Nebraska has stated that it looks for guidance in the Nebraska Rules of Evidence to due process challenges generally. *See In re DLS*, 432 N.W.2d 31, 34 (Neb. 1988).

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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December 27, 2006

2)

No. 06-686

IN THE

Supreme Court of the United States

LUCKY I. IROMUANYA,

Petitioner,

v.

STATE OF NEBRASKA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Nebraska

BRIEF OF *AMICUS CURIAE* NEBRASKA APPLESEED CENTER FOR LAW IN THE PUBLIC INTEREST IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICUS[1]

The Nebraska Appleseed Center for Law in the Public Interest, Inc. is a non-profit, non-partisan public interest law project based in Lincoln, Nebraska. Nebraska Appleseed addresses problems at their roots – such as limited access to legal representation, unfair legislation and public policy, and denial of basic rights and opportunities – rather than the symptoms. Nebraska Appleseed seeks policies and practices that, among other things, insure a justice system that provides the opportunity for fair treatment no matter someone's income, education, race, national origin, or background. Nebraska Appleseed also has considerable experience and focus on the legal and policy issues of the region's "new immigrants," including membership on the Nebraska Supreme Court's Minority and Justice Task Force

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[1] Counsel of record for both petitioner and respondent have consented to the filing of this brief in letters that have been lodged with the clerk. Plaintiff's counsel authored this brief in part and made a monetary contribution to the preparation or submission of this brief.

Implementation Committee. Nebraska Appleseed believes that fair trials are at the core of a fair system of justice, and therefore wishes to share with the court its community-based perspective on the Petitioner's right to a fair trial.

SUMMARY OF ARGUMENT

The case of *Iromuanya v. State of Nebraska* demonstrates a conflict between state supreme courts – a conflict expressly recognized by the Nebraska Supreme Court (A22) – over the issue of whether the constitutional right to a fair trial precludes a member of the victim's family from giving identification testimony when: 1) the relative's testimony is highly emotional; 2) the defendant has stipulated to the identity of the victim; and 3) the testimony was preceded by the undisputed, identification testimony of a non-relative. The Nebraska Supreme Court addressed this issue by balancing of the prejudicial effect of the evidence against its probative value. This brief argues that the right to a fair trial requires, in addition to the above balancing, an examination of the atmosphere of prejudice surrounding the trial and the degree to which that environment increased the prejudicial effect of the evidence.

ARGUMENT

PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL

During the trial and post-trial proceedings, Petitioner's counsel made repeated fair trial objections.[2] The trial court, in turn, expressly addressed Petitioner's motion *in limine* and his post-trial motion as a challenge based on the constitutional right to a fair trial, concluding that Mrs. Cooper's identification testimony "was not so prejudicial as to have denied the defendant his *right to a fair trial.*" (A63) (emphasis added). Describing the issue as one involving the

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[2] In Petitioner's post-trial "Motion for New Trial," Petitioner objected to Mrs. Cooper's testimony on the ground that it "prevented Defendant from receiving a fair trial." (Motion for New Trial, ¶ 2). Also, on October 29, 2004, prior to Mrs. Cooper's testimony, Petitioner made an oral motion to exclude Mrs. Cooper as a witness based on both Rule 403 *and* the concern that Mrs. Cooper's testimony would deny Petitioner a fair trial because of "the impact it would have on the jury." (Trial Tr. Vol. I, 155-56; Motion to Exclude Witness, ¶ 7).

constitutional right to fair trial is consistent with the treatment of this issue by other state courts (including some cited by the Nebraska Supreme Court). *See e.g. Welty v. State*, 402 So.2d 1159, 1162 (Fla. 1981) (describing petitioner's claims as based on the argument that "he was denied a fair trial because the deceased victim's brother was permitted to give identification testimony"); *Bailey v. State*, 261 Ga. App. 291, 295 (2003) (finding family testimony was non-emotional and thus did not "deprive [defendant] of a fair trial"). After raising this issue before the trial court, Iromuanya's counsel repeated his "fair trial" challenge on appeal to the Nebraska Supreme Court[3], urging the Court to take into account the circumstances surrounding the trial and the fact that these external factors increased the prejudicial effect of Mrs. Cooper's testimony.

The right to a "fair trial," encompassing the right to due process under the Fifth and Fourteenth Amendments and

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[3] Appellant's Br. at 35, *State of Nebraska v. Iromuanya*, No. S-05-000367 (Sept. 12, 2005).

the right to an "impartial jury" under the Sixth Amendment,[4] requires an examination of extraneous factors that threaten the neutrality of the jury. It has long been recognized that such an examination is necessary to ensure that juries do not succumb to the prejudices of the public. Nevertheless, despite the fact that the events surrounding Iromuanya's trial may have caused the jury to give undue weight to the testimony of the victim's mother, the lower courts' decisions lack any analysis of the impact of these events.

A. History And Development Of The Right To Fair Trial.

The importance of isolating juries from extraneous considerations, particularly political influences, dates to the Athenian courts of antiquity. Michael Gagerian, The Rule of Law in Gortyn, *in* THE LAW AND THE COURTS IN ANCIENT GREECE (Edward Harris & Lene Rubenstein eds., Duckworth, 2004) at 173. By the eighteenth century, it was

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[4] *See The Juror's Need to Know vs. The Constitutional Right to a Fair Trial*, 97 Dick. L. Rev. 627, 654 n.1 (1993).

the jury, as "indifferent" trier of fact, that came to be viewed as the principal protector of the accused against the power of the state. W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND (T. Cooley 4th ed. 1896) (describing the jury as a "strong and two-fold barrier...between the liberties of the people and prerogative of the crown"). The Founders' insistence upon a judiciary as a co-equal branch of American government was in large part motivated by the fear that placing the judiciary within one of the two other branches of government risked jeopardizing the independence of juries in their consideration of the evidence in criminal cases.[5]

At the beginning of the twentieth century, in a case similar to Petitioner's, Justice Oliver Wendell Holmes warned against the effects of public demonstrations on the right of an accused to obtain a fair trial. Leo Frank, a Jew,

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[5] *See* THE FEDERALIST NO. 47 at 336-38 (James Madison) ("The accumulation of all powers legislative, executive, and judiciary in the same hands, whether of one, a few, or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny.").

was tried in Atlanta for the murder of a young girl who worked in his uncle's factory. Mobs appeared outside the courtroom, and the galleries were filled with spectators who were demonstrably hostile to Frank. Despite these factors, the state contended that Frank's trial was free of procedural irregularities. Holmes dismissed the state's legal formalism, noting that "any judge who has sat with juries knows that in spite of forms they are extremely likely to be impregnated by the environing atmosphere," and concluded that the atmosphere surrounding Frank's trial denied him his constitutional right to a fair trial: "Mob law does not become due process of law by securing the assent of a terrorized jury. We are not speaking of mere disorder, or mere irregularities in procedure, but of a case where the processes of justice are actually subverted." [6]

Half-a-century later, the Court overturned the conviction of a defendant, who had been accused of killing a

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[6] *Frank v. Magnum*, 237 U.S. 309, 347 (1915).

black employee and kidnapping three others, because a filmed interview between the sheriff and the defendant, in which the defendant admitted to the crimes, was widely broadcast during the days immediately following the crime. *Rideau v. Louisiana*, 373 U.S. 723, 723 (1963). The Court concluded, based upon the nature and extent of the prejudice generated by the broadcast, that the jury would have had difficulty reaching an impartial decision. *Id.* at 726-27. Cases such as *Frank* and *Rideau* demonstrate the Court's longstanding recognition of the fact that the environment surrounding a trial must be taken into account so as to ensure that defendants receive a fair trial.

B. Factors Affecting The Petitioner's Ability To Receive A Fair Trial.

The right to a fair trial imposes upon the courts a constitutional duty to prevent the intrusion of those factors which undermine the trial process. *See* Terri A. Belanger, *Symbolic Expression in the Courtroom: The Right to a Fair Trial Versus Freedom of Speech*, 62 Geo. Wash. L. Rev. 318

(1993-1994). Accordingly, courts "must try to prevent the 'atmosphere in and around the courtroom [from becoming] so hostile as to interfere with the trial process.'" *Id. quoting Woods v. Dugger*, 923 F.2d 1454, 1456 (11th Cir. 1991). The essential problem with the decision of the Nebraska Supreme Court is its failure to take into consideration the extent to which extraneous factors – (*e.g.*, the negative publicity leading up to and during the trial, the activity of white supremacists, and buttons with pictures of the victim worn in the courtroom by friends and relatives of the victim) – influenced the jury. These factors denied the Petitioner a fair review of the evidence by increasing the prejudicial effect of Mrs. Cooper's testimony and making it nearly impossible for the jury not to give undue weight to this testimony.

The extraneous factors that threatened the neutrality of the jury are threefold: 1) the negative public light cast on the Petitioner, arising in part out of the recent influx of immigrants into Nebraska; 2) white supremacist activity

surrounding the trial, with a direct effort to connect Petitioner to community prejudices; and, 3) the media attention afforded the victim due to her prominence in the community and the fact her life was taken by a member of an unwelcome new population.

The problem experienced by the Petitioner is not, unfortunately, unique in the State of Nebraska. Leaders within the legal and judicial system in Nebraska have recognized that minorities (including African and Latino immigrants) have less access to justice in Nebraska, including the right to a fair trial. These leaders therefore launched an ongoing process to address the barriers to justice that exist for minorities in Nebraska. Chaired by a Nebraska Supreme Court Justice, the Nebraska Supreme Court's Minority and Justice Task Force has found that "bias exists in the Nebraska justice system." Nebraska Minority and Justice Task Force, *Final Report*, January 2003, at xvii. In turn, the task force has committed itself to "a morally searching, permanent, institutional effort to study, address

and change those practices and procedures that may disadvantage minorities, whatever the cause of those practices." *Id.*

This is an honorable and necessary initiative. The implementation of these system-level reforms is, however, a long-term effort. In the Petitioner's case, the lingering effects of a system that has not yet come to full grips with how it insures a fair trial for every individual, despite race, ethnicity, or national origin, contributed to the conduct of a flawed trial.

The problems found in Nebraska's justice system have been heightened by Nebraska's rapidly growing foreign-born population (mostly Latino and African), the largest surge in over one-hundred years. Nebraska's foreign-born population, for example, grew the fastest of 10 Midwestern states between 1990 and 2000. Percentage growth in that same category from 2000-2005 was the eighth highest of any state in the United States. *See* Art Hovey,

Immigration Study Ties Strains on Communities to Reform Gridlock, LINCOLN JOURNAL STAR, December 5, 2006, at B1.

This demographic change in a previously white area of the country has come with both opportunity and great community frustration. The continuing failure of the federal government to adopt immigration reforms has left communities struggling with stopgap solutions to problems associated with rising immigrant populations, including those in the justice system. Over the last five years, local communities, including Lincoln, have been wrestling with how best to respond to these growing populations as well as deal with new "anti-immigrant" public actions and community sentiments. *Id.* (including how "the dialogue on immigration issues in the state is taking on increasingly racial overtones").

The Petitioner's family origins are of a piece with that surging population, and the community viewpoint as to newcomers such as the Iromuanyas is commonly negative. This is reinforced by how the media reported upon the trial.

The Petitioner's race and family origins was consistently referenced by the media, and usually offered in counterpoint to that of the victim's. The media consistently pointed out the same comparison between the victim and the Petitioner, in addition to issues related to interracial dating. *See, e.g., Jury Questionnaires to Have Question on Race,* LINCOLN JOURNAL STAR, September 25, 2004, at B3. The reality of a "white victim" and "black", "foreign," defendant was therefore abundantly clear to the community as a whole.

While this by itself is not reason for a new trial, it heightened the need for the trial court to conduct a fair trial. This extraneous factor was compounded by the actions of a very aggressive white supremacist group, which came into Lincoln specifically to exploit this tension. Given the type of media attention already given the race and origin of the Petitioner, the fact that white supremacists focused on the Petitioner's case was not surprising. A small amount of enterprise on their part was all that was necessary to ascertain that certain members of the Lincoln community were already

viewing the Petitioner's race and national origin as relevant to the proceedings.

In turn, their modest investment obtained a considerable return as the news reports from different major newspapers in the community not only ratcheted up the community concern regarding the white supremacist presence (including the "unprecedented" closing of the State Capitol and busy streets in downtown Lincoln), but also by consistently stating the reason for the white supremacist rally in the same manner and consistently making the same racial comparison between the victim and the Petitioner. *See, e.g.*, Martha Stoddard, *Nazi Rally to Draw Police Attention, Lincoln Authorities Plan 'Extraordinary Steps' to Keep the July 17 Event Peaceful*, OMAHA WORLD HERALD, July 2, 2004, at B4 ("Cooper, a 21-year-old University of Nebraska-Lincoln soccer player, was white. Lucky Iromuanya, who is black, has been charged with second-degree murder in her death."); Martha Stoddard, *Capitol Will Close for Nazi Rally*, OMAHA WORLD HERALD, July 13, 2004, at B1 ("The

commander of the National Socialist Movement ... said the group is going to Lincoln ... to draw attention to the number of Mexican immigrants in the state and to the shooting death of Jenna Cooper. Cooper, a 21-year-old University of Nebraska-Lincoln soccer player, was white. Lucky Iromuanya, who is black, is charged with second-degree murder in Cooper's death.").

Through their rallies and leafleting, the white supremacists achieved their objective: a continued poisoning of community sentiment against the Petitioner. The trial court in its balancing of factors should have been doubly certain, therefore, that a fair trial for the Petitioner occurred in all respects.

The victim, meanwhile, was consistently portrayed by the media as the highly respected and admired captain of the University of Nebraska-Lincoln's soccer team. *See, e.g.*, Shannon Henson, *Iromuanya Was Shocked to Hear Bullet Hit 2 People*, OMAHA WORLD HERALD, December 16, 2004, at B3 ("Cooper... anchored an NU defense that helped the

Huskers make their eighth straight NCAA tournament in 2003."). The relevance of the victim's prominent role in the University of Nebraska-Lincoln's athletic program to the critical importance of insuring fair trial procedures for the Petitioner cannot be understated. Lincoln and Nebraska as a whole is justifiably proud of its university athletic program, and the ways in which the program binds together a large state. To be a "Cornhusker" supporter is to be, in large part, self-identifying as part of the mainstream culture.

While a strong common bond, it also can reinforce community sentiment against those perceived as harming the program. It is clear that those who negatively affect the program are "outsiders," and must be penalized for their actions. The wearing of "buttons" in the courtroom accentuating the victim's soccer playing and role in the community played up the social violation committed by the Petitioner. In the case of the Petitioner, the fact he did not receive a fully fair trial and the subsequent harsh verdict

against him is in part explainable by this community prejudice.

The right to a fair trial for the Petitioner must not be denied. Nebraska is making huge strides towards equal justice for all, led by the courts and juries that daily must make decisions that balance many different considerations. Nevertheless, there are many new challenges to achieving this goal, and new immigrant and racial impacts on a previously homogenous society must continue to be addressed. In the case of the Petitioner, the balance necessary to insure a fair trial was clearly affected by extraneous factors and circumstances that affected the neutrality of the jury.

CONCLUSION

For the reasons set forth above, the Petitioner's petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 18, 2006